Supreme Court, U.S.
FILED
NOV 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-226

IN THE

Supreme Court of the United States

October Term, 1988

BENJAMIN R. WARD, in his official capacity as Police Commissioner of the City of New York; GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks; SHELDON HOROWITZ, in his official [capacity] as Special Events Director for the Department of Parks; ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation; JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation; MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and THE CITY OF NEW YORK,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

(Volume II-Pages JA 351 to JA 495)

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PETITION FOR CERTIORARI FILED AUGUST 5, 1988
CERTIORARI GRANTED OCTOBER 3, 1988

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Appendix to the United States Court of Appeals for the Second Circuit:
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PLAINTIFFS

ROCK AGAINST RACISM A2

DEFENDANTS HAIGHT, J.

WARD, HON. BENJAMIN R., in his official capacity as Police Commissioner for the City of New York

SCARPELLI, GEORGE, in his official capacity as Chief of Operations for the Department of Parks

HOROWITZ, SHELDON, in his official capacity as Special Events Director for the Department of Parks

CAUSE **SC**

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)
Purs. to 28 U.S.C. 1331, 1332, 1341, 1651 and 2210; 1st & 14th Amndmts. of U.S. Const.

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DATE	NR.	PROCEEDINGS
4-18-85	1	Fld. Complaint; Issd. Summons & Notice purs. to 28 U.S.C. 636(c).
4-18-85	2	Fld. Pltff's Order to Show Cause why a Preliminary Injunction should not issue purs. to rule 65, directing said deft's to permit pltff to conduct a protest & demonstration concert at the 72nd St. Bandshell on 5/5/85, Ret; 4-25-85..Haight, J.
4-24-85	3	Fld. Pltff's atty Notice of Appearance MBG
5-2-85	4	Fld. Deft's Affdvt of Robert Russo, in opposition to pltff's request for injunctive relief.
5-2-85	5	Fld. Deft's Affdvt of Lieutenant Joseph McNulty, in opposition to pltff's request for injunctive relief.
5-2-85	6	Fld. Deft's memorandum in opposition to pltff's request for injunctive relief.
5-2-85	7	Filed stip & Order of Partial Settlement, the dept. agrees to issue to Rock Against Racism a permit to use the Bandshell area for the purpose stated above on 5-5-85, etc. Pur. to Article II, §3(d) of the Parks Rules & Regulations Rock Against Racism will be required to post an undertaking in the amt. of $1,000., no later than 5-2-85 etc. as so indicated. So ordered Haight, J.
6-14-85	8	Fld defts' ANSWER to the cmplt. CC
7-17-85	9	Fld. Order following initial pre-trial conference held on 7-12-85. . . that the action be placed on the Suspense docket of this court with leave to either party to appiy on 5 days notice for its restoration, etc. . Haight, J. cmc
9-4-85	10	Filed transcript of record of proceedings 4-26-85

DATE	NR.	PROCEEDINGS
4-23-86	11	Fld. Pltff's Motion for a Temporary Restraining Order/Preliminary Injunction against the deft from interfering with a scheduled concert.
4-29-86	12	Fld. Defts MEMO OF LAW in opp to pltffs motion for inj relief
4-29-86	13	Filed ORDER defts memo in opp to pltffs motion for TRO & prelim inj serv & filed by hand by 4/29, pltffs reply by 4/30, oral argument on 5/1 . . . HAIGHT, J. cm
5-2-86	14	Filed Defts AFFDVT of J. Killian in opp to pltffs motion for inj relief
5-2-86	15	Filed MEMO OPINION & ORDER# 59257, RAR can use its own sound system. I decline to releive RAR of the liability insurance req. all other charges apply exp sound system; permit will extend to 7pm if RAR so req . . . . Haight, J. cmc
5-19-86	16	Filed Defts NOTICE OF APPEAL to USCA 2nd Cir from USDC order of 5/2
6-3-86	17	Filed a true copy of NOTICE OF MOTION from USCA 2nd Cir; the motion for exp appeal is denied. Record on appeal shall be filed by 6/11; appellants brief & joint appendix by 6/23; appellees brief by 7/14; week of argument as early as 8/11 . . . CLERK, USCA

Joint Exhibit 1 Submitted In Evidence On March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
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REPRODUCED, *SUPRA*, ON PP. JA14-JA17

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Appendix to the United States Court of Appeals for the Second Circuit:
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Appendix to the United States Court of Appeals for the Second Circuit:

Motion for a Temporary Restraining Order/ Preliminary Injunction

REPRODUCED, *SUPRA*, ON P. JA 21

Joint Exhibit 1 Submitted In Evidence On March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
Certificate of Notice to Adverse Parties

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

v.

HON. BENJAMIN R. WARD, et al.,
Defendants.

No. 85 Civ. 3000 (CSH)

CERTIFICATION OF NOTICE TO ADVERSE PARTIES

Counsel for plaintiffs makes the following certification of notice to the adverse parties, pursuant to Local Rules.

On or about Wednesday, April 9th, 1986, I spoke with Joe Killian of the Parks Department concerning the new "permit application" which had been received by Rock Against Racism. Mr. Killian said that the permit application had been personally reviewed by the commissioner of the Parks Department, who he pointed out was a lawyer, and that he felt there was no chance that the requirement that the Parks Department control the sound system would be changed. Mr. Killian identified the attorney who would handle the case if we chose to challenge the various restrictions. Subsequently I spoke with that attorney who indicated that he had reviewed the document in question and believed that all the provisions were constitutional. I told the attorney that I was

leaving for Tucson, Arizona the next day to prepare for a trial there and provided him with a number where I could be contacted. I have heard nothing and therefore presume that the city has not changed its position as of April 20th, 1986.

s/ James H. Fosbinder
JAMES H. FOSBINDER

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(Local Counsel)

Joint Exhibit 1 Submitted In Evidence On March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
Temporary Restraining Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

v.

HON. BENJAMIN R. WARD, *et. al.*,
Defendants.

No. 85 Civ. 3000 (CSH)

TEMPORARY RESTRAINING ORDER

Upon consideration of plaintiff's Motion for a Preliminary Injunction, and the declarations, pleadings, evidence, and argument in support, and the Opposition thereto, the Court finds:

1. That plaintiffs wish to engage in First Smendment activity at the Central Park Bandshell from approximately 6:00 am to 10:00 pm (including set up time) on May 4th, 1986.

2. That defendants will apply the various prohibitions on the "new permit" against plaintiffs and have them arrested and prosecuted if they demonstrate as planned.

3. That this action by defendants will cause irreparable injury to plaintiffs.

4. That there is a likelihood that plaintiffs will prevail on the merits of this case.

5. And that the balance of injuries and public interest is in plaintiff's favor.

In light of the above, it is hereby

ORDERED, that pending further Order of this Court, defendants shall not enforce the requirements that a city-chosen and controlled sound system be used, that a $50.00 to $100.00 fee should be required, that $100.00 per hour be paid to the city's chosen sound company, that the display of banners and posters be prohibited, that the collecting of donations or sale of literature, etc. be prohibited, that liability insurance be provided, or that a bond be required; and it is further

ORDERED, that defendants shall file and personally serve their response to plaintiff's Motion for a Preliminary Injunction not later than _____, 1986; that plaintiffs shall file and personally serve any reply not later than _____, 1986; and that the hearing on the Motion for a Preliminary Injunction will be heard in this Court on _____, 1986; and it is further

ORDERED, that a copy of this Order shall be served on each of the defendants.

_____

U.S. DISTRICT COURT JUDGE

Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit: Order for Preliminary Injunction

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

v.

HON. BENJAMIN R. WARD, *et. al.*,
Defendants.

No. 85 Civ. 3000 (CSH)

ORDER FOR PRELIMINARY INJUNCTION

Upon consideration of plaintiff's Motion for a Preliminary Injunction, and the declarations, pleadings, evidence, and argument in support, and the Opposition thereto, the Court finds:

1. That plaintiffs wish to engage in First Smendment activity at the Central Park Bandshell from approximately 6:00 am to 10:00 pm (including set up time) on May 4th, 1986.

2. That defendants will apply the various prohibitions on the "new permit" against plaintiffs and have them arrested and prosecuted if they demonstrate as planned.

3. That this action by defendants will cause irreparable injury to plaintiffs.

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In light of the above, it is hereby

ORDERED, that pending further Order of this Court, defendant shall not enforce the requirements that a city-chosen and controlled sound system be used, that a $50.00 to $100.00 fee should be required, that $100.00 per hour be paid to the city's chosen sound company, that the display of banners and posters be prohibited that the collecting of donations or sale of literature, etc. be prohibited, that liability insurance be provided, or that a bond be required.

U.S. DISTRICT COURT JUDGE

Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit: Application for a Temporary Restraining Order and Supporting Points and Authorities

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

v.

HON. BENJAMIN R. WARD, *et. al.*,
Defendants.

No. 85 Civ. 3000 (CSH)

APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND SUPPORTING POINTS AND AUTHORITIES

Plaintiffs seek to put on an event consisting in part of speeches, and in part of music. The event has been held for approximately ten years at the same site, the Central Park Bandshell, on the same date, the first Sunday in May, and is expected to run as usual from approximately 11:30 am until approximately 7:00 pm

STATEMENT OF FACTS

Plaintiff is an organization formed to provide a non profit sound organization to be used at rallies, demonstrations, cultural festivals and other similar events. Plaintiff organization has for

approximately ten years sponsored an event on the first Sunday of [220zMay at the Central Park Bandshell. The City of New York has repeatedly attempted to deny this group access to this facility. Last year, 1985, following several days of testimony, the city dropped its requirement that the event be held at Randall or Ward Island. Subsequently various other requirements concerning control over the volume, the length of the event, the distribution and the amount of music versus speech, and hours of access for setting up, were dropped thus satisfying the plaintiff. The event went on as originally planned.

The city agreed to review its permit process and requested input from the plaintiff with regard to proposed changes. Not until the end of March, 1986, was a copy of the proposed changes provided. The plaintiff received a "new permit application" requiring, among other things, that the city be allowed to choose a sound system, that $100.00 an hour be paid to the city chosen xound company, that a $50.00 to $100.00 application fee be paid, that no banners or posters be displayed, that no literature be distributed or sold, that donations not be accepted, that a clean-up bond be provided, that the hours be limited, and that liability insurance be provided at the city's discretion.

ARGUMENT

A Temporary Restraining Order should be granted because there is a likelihood of irreparable harm in the absence of injunctive relief, plaintiffs are likely to succeed on the merits of the underlying cause of action, the balance of injuries favors granting an injunction, and the public interest would be served by granting the injunctive relief sought. *Virginia Petroleum Jobbers Association* v. *Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958).

I-Likelihood of Irreparable Harm

Absent injunctive relief from this Court, plaintiffs will suffer irreparable harm. Plaintiffs wish to engage in protected First Amendment activity. Without an injunction, they will be arrested and incarcerated, and that is irreparable harm to the cause they espouse and to their own liberty. It cannot be given back or compensated once taken. The plaintiffs who persist in the demonstration will be forever tainted and diminished by an arrest an incarceration, and those who have foregone the protest because of the threat of arrest have lost their First Amendment rights. This plainly sets out a claim of irreparable harm.

II-Likelihood of Success on the Merits

Plaintiffs are likely to succeed for the following reasons:

The burden of establishing the need for a condition on expression is on the government, not only when the strict scrutiny test is used but even when the time, place and manner doctrine or *United States* v. *O'Brien* test is applied. *Clark* v. *Community for Creative Non-Violence*, 104 S. Ct. 3065, 3069-72 (1984); *Eastern Conn. Citizen Action Group* v. *Powers*, 723 F.2d 1050, 1055 (2d. Cir 1983); *New York City Unemployed & Welfare Council* v. *Breznoff*, 677 F.2d 232, 237, 240-41 (2d. Cir. 1982).

The history of this case reveals strong antipathy toward this group by city officials. The following testimony from the previous hearing for a Temporary Restraining Order in this case illustrates this:

RUSSO, pp. 35-36

> THE COURT: Would you, taking your time and using your own words, of course, tell me what the reason or reasons were that played a part in that decision I want to understand, in as great detail as you can explain to me, what the reasons for the rejection of the permit were.

THE WITNESS: Okay. For the past four years that I have been aware of this event, and my predecessors who were involved in it directly have told me, this group is very difficult to deal with. They're dishonorable. What this means is when, for example, we ask for a clean-up bond of $1000 or $2000 for an event that's going to take place on Saturday, somebody comes at 8:00 Friday night with a bag full of dollar bills and change that is far short of the clean-up bond.

Year after year, we've had difficulty with the sound. One year, it was reported to me that there was a performance that took place that was called slam dancing, where people got up on the stage and punched each other and kicked each other and fought and raised a crowd. One year, I was told a police detail had to be brought in because there was a dispute over turning the sound off.

Additionally, the city persists in its belief that because part of plaintiff's event consists of music, traditional free speech rights are somehow not relevant. This is clearly contrary to the law. *Cinevision Corp.* v. *City of Burbank*, 745 F.2d 560, 569-70 (9th Cir. 1984).

Russo-direct, pp.14, 10-16

THE WITNESS: Well, the Parks Dept.,—I represent the Parks Dept.—we don't feel we should abridge anybody's right to speak for as long as they can reasonably do that without disturbing anybody else. But I think that music is different, that that can annoy other people. I know that it sometimes annoys other people, any kind of music.

Not only do the new "permit rules" continue this misconception, but by suggesting a general ban on music after 6:00pm except the opera, they reveal their clear "cultural" bias.

Surely the government can show no compelling state interest in requiring a group protesting government policy to pay a thousand dollars each day to use a sound company selected by the city,

when that group owns its own sound system. The "mixing board" for a sound system of the size in question allows literally thousands of separate adjustments to the quality, volume, and tone of each instrument, speaker or device inputted into the system. To place this control in the hands of the government presents infinite opportunity for abuse.

Where First Amendment rights are implicated, compelling state interest must be "unrelated to the suppression of free expression", *Young* v. *American Mini Theatres*, 427 U.S. 50, 79-80 (1976) (Powell, J. concurring).

> "Above all else, the First Amendment means that government has not power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship in content control."
> *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1971).

Only proof of a clear and present danger is compelling:

> "[I]n order to restrict speech, the State must show that the speech is used in such circumstances and [is] of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that [the State] has a right to prevent'."
> *California* v. *LaRue*, 409, U.S. 109, 131 (1972) (Marshall, J. dissenting on other grounds).

The restrictions on distributing leaflets, displaying banners, posters, and accepting donations, cannot possibly survive constitutional challenge. *Lovell* v. *City of Griffin*, 303, U.S. 444 (1938).

Since the city does not require bicyclists, roller skaters, joggers or frisbee players to insure themselves or provide a clean-up bond, it is unfair to require those who enter the park to engage in activities protected by the First Amendment to insure themselves

or provide a cleanup bond before entering the park. The First Amendment protects not only speech, but also assembly. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, (1982).

III-Balance of Injuries and Public Interest

The balance of injuries is in favor of the plaintiffs, and the public interest would be served by granting the injunction. To deny the injunction means that plaintiffs will either have to forego or diminish their demonstration, or face prosecution and incarceration if they persist as some plan to do. Defendants have little at risk compared to plaintiffs, especially in light of the limited duration of a Temporary Restraining Order.

First Amendment freedoms are the most cherished by our people. The public has a strong interest in upholding the First Amendment, and any preliminary ruling, especially where it would cause no harm to the government, should err on the side of upholding these freedoms.

Because plaintiffs have shown that they will suffer irreparable harm and are likely to succeed on the merits, and that the balance of injuries and the public interest is in their favor, they request that this Court grant a Temporary Restraining Order against enforcement of the regulations as applied to their demonstration.

s/James H. Fosbinder

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Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit: Affidavit of Christie Robb, Read in Support of the Application for Injunctive Relief

AFFIDAVIT
85 Civ 3000 (CSH)

I, Christy Robb, do hereby depose and say that

on February 26, 1986, at approximately 3:45, Joe Killian called me to tell me that he was the new program director for the bandshell in Central Park. He had been hired January 26, and his first task was to create specific guidelines for use of the bandshell. He had written these and was waiting for approval from the Commissioner. He was extremely vague as to how this new system would work. I reminded him of the "system" in the past and he said he "hoped to be able to respond to applicants within two weeks". I asked him how this transition in Parks Dept. format would affect my event this May, and he said all permits filed under Special Events "would be honored". I tried to ascertain what exactly that meant. I was unable to get any clear answer as to what the differences would be in terms of the permit. On approximately April 1st, 1986, I received a "new permit application". This new permit requires us to use a sound system selected and controlled by the Parks Department, requires us to agree not to display any banners or posters, to refrain from the sale of any literature or the solicitation of any donations, to pay approximately $800.00 (8 x $100.00/hr.) to the sound company selected by the city, forbids us from going past 6:00 pm, requires a $50.00 to $100.00 application fee, requires a cleanup bond, and may require us to provide liability insurance.

The purpose of our organization is to provide quality sound for a variety of organizations and groups with which we identify.

Affidavit of Christie Robb, Read in Support of the Application for Injunctive Relief

In addition to preventing us from providing our own sound at our annual event, this system would prevent us from providing sound services (for far less than $100.00/hr.) for a variety of other groups which have used the bandshell in the past. The effect of these new permit rules would be to render much of what we have worked for pointless. I believe that that is the goal of these new regulations.

s/ Christy Robb
CHRISTY ROBB
organizer of RAR events

Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit: Annexed to the Affidavit of Christie Robb- Use Guidelines for the Naumberg Bandshell in Central Park

City of New York
Parks & Recreation

The Arsenal
Central Park
New York, New York 10021

Henry J. Stern
Commissioner

Elizabeth Barlow
Central Park Administrator

March 21, 1986

USE GUIDELINES FOR THE NAUMBURG BANDSHELL IN CENTRAL PARK

The Naumburg Bandshell is located in the heart of Central Park. The Concert Ground and Bandshell are between the Mall and Bethesda Terrace, with easy access to 72nd St. and Fifth Ave. Concerts and performances have been an integral part of this area since the original bandstand was built in 1862.

Central Park is in the midst of a large scale program of restoration and improvement of park management. All of the work is being done with careful consideration both of its use as a neighborhood park for millions of New Yorkers, and as major tourist attraction. The Parks Department has adopted the following guidelines for the Bandshell to assist outside sponsors of events in understanding their responsibilities; to prevent overuse, crowding, security problems and excessive noise; and to avoid conflicts with other users of Central Park.

Remember that because there is such a wide range of interest in using the Bandshell there are bound to be scheduling and permit

conflicts. On an average June weekend more than 100,000 neighbors come to Central Park. Many come for passive recreation away from the City; for many, the Park is an oasis to walk in, sleep, fly a kite, meet friends, or read.

Most potential problems can be avoided by thoroughly reviewing these guidelines and the guidelines of the Parks Department Special Events Permit. These Bandshell guidelines may, in some instances, amend and supersede the Special Events Guidelines.

If your proposed event does not meet these guidelines, consider using an alternate site. Throughout New York City there are underutilized parks and bandshells. Many communities would welcome a performance or special event.

PERMITS

Sponsors planning to use the Naumburg Bandshell must obtain the following permits:

1) *Special Event Permit*-Available from: Bandshell Program Director. There is a non-refundable processing fee, minimum $50, maximum $100. A cleanup bond must also be posted. A liability may be necessary.

2) *Central Park Bandshell Permit*-Available from: Bandshell Program Director, The Arsenal Rm. 103, 830 Fifth Ave., N.Y., N.Y. 10021. The Department of Parks and Recreation is the sole and only provider of sound amplification. A user fee of $100 per performance hour, plus a one hour sound check is charged. This fee is due within seven days of receipt of a signed Bandshell Permit. It must be payed with a certified check or money order (no personal checks or cash) made payable to Cultural Council Foundation/Concert Fund.

3) *Vehicle Permits*-Available from: Bandshell Program Director (SEE ABOVE). There is no fee for vehicle permits.

4) *Concessions Permit*-Available from: Concessions Office, The Arsenal, Rm. 405, 830 Fifth Ave., N.Y., N.Y. 10021. Information: (212) 360-8153.

Permits are non-transferable and non-assignable.

Permits (Originals Only) must be in possession of the person designated on the Bandshell Permit. This person and persons named as responsible for cleanup must be present for the entire event.

HOURS/DATES OF USE

Hours of use may vary depending on the type and anticipated size of the event. Most performing arts events can be permitted for two hours, with a maximum of two hours pre-performance set up and maximum of two hours break down.

Festivals and multiple performance events can be permitted for a maximum of six hours, with a maximum of two hours pre-performance set up and maximum of two hours break. Festivals may be permitted between 12:00 P.M. and 6 P.M.. In deference to nearby residential neighbors and Park users who enjoy quiet mornings, sound amplification is permitted only after 12:00 P.M.. This may be waived in certain cases of children's theatre and acoustic music. Evening performances are permitted under certain circumstances. Evening events must be finished by 9:30 P.M.. Sponsors must be prepared to provide their own stage lighting. All light specifications must be attached to the Bandshell permit. Sponsors are limited to the exact times listed on the Bandshell permit. The Department of Parks and Recreation will not extend or amend these times due to technical problems, late arrivals, parking difficulties, audience demand, or weather conditions.

Rain dates will be allocated at the sole discretion of Department of Parks and Recreation.

ATTENDANCE

The Concert Ground and Bandshell are located on a major circulation route between the Mall/Sheep Meadow and the Lake/Bethesda Terrace/72nd St. Crossover road. Seasonally, this area attracts more visitors than any other area in Central Park. To keep this route open and accessible without overflowing to the Mall, Terrace or the Pergola, the Bandshell/Concert Ground can accommodate a maximum of 3,000 people at any event.

If the sponsor or the Bandshell Program Director anticipates more than 3,000 an alternative site must be considered. For a program to be effective, manageable, and with proper security the crowd size must be limited to the above figure.

SOUND AMPLIFICATION

To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS.

Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician will be fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park. The sound technician must also consider the Bandshell's proximity to Sheep Meadow, activities at Bethesda Terrace, and

the New York City Department of Environmental Protection recommendations.

INSURANCE

Many events are required to have in effect at all times insurance in the amount stated on the Special Event Permit. The City must be named as additional insured on liability and property damage policies. The City must be the sole party insured on the fire and extended coverage policy. The insurance companies must be licensed to do business in New York. Even though a sponsor may have insurance, the sponsor is still personally responsible for any claims made by an employee or member of the public against the sponsor or the City arising from the use of the Bandshell. The sponsor must repay the City any costs incurred due to such claims.

DISPLAY AND DISTRIBUTION OF LITERATURE

Sponsors may not distribute, post, display, or affix handbills, flyers, posters, flags or banners. Sponsors may distribute a program for the event.

VEHICLES

Vehicles must have permits. Permitted vehicles may arrive a maximum of two hours pre-performance and depart a maximum of two hours post-performance. Upon arrival at the Bandshell vehicles are given one hour to unload. The vehicles may then be parked at 76th Street closed road. No vehicles of any kind may be parked at the Bandshell, Concert Ground or adjacent areas during an event or performance. After the event, vehicles may load for a maximum of one hour.

The Bandshell Program Director will advise the sponsor of any races or parades which must be taken into consideration in determining delivery and pick-up times.

CONCESSION OF GOODS

Any event staged strictly for advertising and promotion purposes is not allowed. Sponsors wishing to sell items related to the event must have a Concessions Permit. The Department of Parks and Recreation retains the right to restrict the commercialization of the Bandshell and Concert Ground.

REVENUE

Sponsors and individuals may not solicit for funds and revenue within Central Park. The Department of Parks is the sole and only party allowed to collect contributions.

SAFETY

Public safety and safety of the park are crucial for a successful event. The New York Police Department and Department of Parks and Recreation Enforcement Patrols (PEP) will be in attendance at events as is deemed necessary. Out of concern for public safety the following are prohibited:

* Use of fire of any sort.
* Use of weapons and dangerous implements.
* Cooking grills, stoves, hibachis, and other portable ovens.
* Portable showmobiles, stages, and trailers.

PORTABLE TOILETS

For times when anticipated general park use level is high, meaning that nearby restrooms will already be heavily used, the sponsor may be required to provide one portable toilet for every 250 anticipated attendees. Vendor information can be obtained from the Bandshell Program Director.

A vendor should be chosen who can guarantee delivery the day of the event—not before (Saturday in the case of Sunday events),

and pick-up by noon the following day (Monday in the case of Saturday events). The sponsor is responsible for complying with these requirements so be forewarned to contract with reliable vendors.

All delivery vehicles must have vehicle permits.

CLEANUP

All sponsors expect and appreciate a clean, litter free stage and concert ground. Sponsors must be prepared to return the Concert Ground and Bandshell area to a clean, litter free state.

All sponsors must provide ample industrial weight (3 ply) plastic garbage bags and personnel to clean the Bandshell site. Sponsors must list on the permit application the name, phone number, and address of the person responsible for directing cleanup operations. This person must be identified to the Bandshell Program Director or his representative at the beginning of the event, and show proof of garbage bags. The stage and backstage areas must be swept clean. Department of Parks and Recreation is responsible to load and cart all bagged garbage.

EVALUATION

All events will be attended by a representative from Department of Parks and Recreation. Each event will be evaluated according to these Bandshell Guidelines and the Department of Parks and Recreation Special Events Guidelines. Specific attention will be paid to sound level, attendance, cleanup, and respect for Central Park and its users. Sponsors will also be provided with an evaluation form of the Department of Parks and Recreation's compliance with these guidelines.

FAILURE TO FOLLOW THESE GUIDELINES AS PROVEN BY EVALUATION AND DOCUMENTATION CAN RESULT IN FORFEITURE OF BOND, AND PROVIDE REASON TO DENY THE SPONSOR OR MAJOR RESPONSIBLE

PARTIES ANY AND ALL FUTURE BANDSHELL PERMIT APPLICATIONS.

For more information please call Joseph Killian, Program Director (212) 988-4460.

Joint Exhibit 1 Submitted in Evidence on March 24, 1987
Appendix To The United States Court of Appeals
for the Second Circuit:
Affidavit of Joseph Killian,
Read in Opposition to the Motion for Injunctive Relief
with Annexed Exhibits

REPRODUCED, *SUPRA*, ON PP. JA22–JA77

Joint Exhibit 1 Submitted in Evidence on March 24, 1987
Appendix To The United States Court of Appeals
for the Second Circuit:
Affidavit of Chad. A. Vignola,
Read in Opposition to the Motion for Injunctive Relief

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

- against -

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, *et. al.*
Defendants.

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF

85 Civ. 3000 (CSH)

STATE OF NEW YORK)
:SS:
COUNTY OF NEW YORK)

CHAD A. VIGNOLA, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of FREDERICK A.O. SCHWARZ, JR., Corporation Counsel of the City of New York, attorney for the defendants in this action. I represented defendants in last year's proceedings brought by plaintiff Rock Against Racism ("RAR"). As such, I am fully familiar with the facts and circumstances of this action.

2. Plaintiff's memorandum of law in support of its motion for a preliminary injunction contains several misstatements, and distortions in its recounting both of last year's proceedings and of the issuance of the "USE GUIDELINES FOR THE NAUMBURG BANDSHELL IN CENTRAL PARK" ("Use Guidelines"). Plaintiff's counsel, James Fosbinder, was present at last year's proceedings, however, his signature on the memorandum

of law is not an assurance of the veracity of the statements contained therein. *See* Fed. R. Civ. P. 11.

3. For example, plaintiff states in its Application For A Temporary Restraining Order And Supporting Points And Authorities ("Plaintiff's Memorandum of Law"):

> Last year, 1985, following several days of testimony, the city dropped its requirement that the event be held at Randall or Ward Island. Subsequently various other requirements concerning control over the volume, the length of the event, the distribution and the amount of music versus speech, and hours of access for setting up, were dropped thus satisfying the plaintiff. The event went on as originally planned.

Plaintiff's Memorandum of Law at 1-2. These statements are false. Because the Court obviously was present for much of last year's discussions, I will not belabor the chronology which is as follows:

4. RAR served its Order To Show Cause papers on the City of New York on April 19, 1985, seeking an order requiring issuance of a permit to use the Bandshell for a concert/political rally from 9:00 a.m. to 9:00 p.m. The City filed its opposition papers on April 24, 1985, citing a history of plaintiff's flagrant violations of past agreements on sound levels, improper clean-up efforts, and recurring crowd control problems, in support of its decision to deny RAR use of the Bandshell, and its suggestion that Randalls Island or Ward's Island might be more appropriate alternative sites.

5. On April 25, 1985, no hearing was held, but the parties appeared before the Court. At the onset, Mr. Fosbinder asserted first that there could be no regulation whatsoever of a public forum such as the Bandshell, and second that any regulation of noise was constitutionally impermissible. Plaintiff ceased pursuit of either of these legal theories after defendants noted that regulation of public forums and sound levels had been sanctioned expressly by Supreme Court precedent. *See, e.g., United States* v. *Grace*, 461 U.S. 171, 177 (1983) (reasonable time place and manner restrictions constitutionally applied in a public forum); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972) (upholding noise ordinance); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (upholding noise ordinance).

6. This Court, however, suggested that it might be in both parties' interest to attempt to reach an amicable resolution of the dispute. Accordingly, that evening defendants agreed to issue plaintiff an event permit for use of the Bandshell if RAR would agree to abide by all Parks' Department regulations, including the noise level restriction which it had violated in the past. The parties agreed that the only issue for resolution by the Court was the permissible decibel level. There had not been any hearing, or "several days' testimony", as plaintiff falsely states in its memorandum of law.

7. Similarly, all other requirements were not "dropped" as plaintiff claims. For instance, plaintiff sought performance time in its order to show cause papers of 9:00 a.m. to 9:00 p.m. The performance hours as fixed by the Stipulation of Partial Settlement ("Stipulation"), were restricted to noon to 6:00 p.m. as originally offered by defendants. Plaintiff also states that restrictions on volume also were dropped. Yet, in paragraph one of the Stipulation signed by plaintiff, plaintiff agreed: "The permit is subject to strict compliance with its terms and with all applicable Parks' Department Rules and Regulations, *including the regulation directed towards excessive noise* . . . ." (Emphasis added). Plaintiff agreed to a restriction on the number of vehicles permitted in the park, agreed to identify those vehicles in advance, agreed to post a clean-up bond and agreed to all other reasonable regulations on the use of the Bandshell. A copy of the Stipulation of Partial Settlement is annexed hereto as Exhibit "A" for the Court's convenience.

8. Although the Court indicated that it had misgivings about whether it was proper for the Court to set a decibel level, a hearing was held on that issue with Robert Russo, the then Assis-

tant Commissioner for Citywide Services, and Milton Schulman, an acknowledged expert in the area of measuring and analyzing sound, testifying on behalf of the Parks' Department. A copy of the complete transcript of the proceedings on April 26, 1985, before the Honorable Charles S. Haight ("Transcript"), is annexed hereto as Exhibit "B".

9. The prior year, 1984, at a meeting with Parks' Department officials, RAR had requested the setting of a specific permissible decibel level of sound for their concert performance. RAR claimed that a specific decibel level was necessary to ensure an "objective" measurement of "excessive sound" by the Parks' Department. Plaintiff's failure to abide by the subsequent agreement which they themselves had sought, was a principal reason for the initial denial of the Bandshell permit in 1985. During the course of last year's proceedings, however, plaintiff reversed itself, and stated that it no longer sought a specific decibel level of permissible sound emission. Indeed, it then claimed that such a restriction was improper.

10. As a result, the Department initially found itself attempting to establish a specific maximum decibel level. After discussions with one of its experts, Milton Schulman, (as well as his testimony), which revealed that the event-to-event variations of the numerous factors figuring into such a decibel setting made such a task neither simple nor warranted, the Department reconsidered its position. Parks decided not to seek a specified permissible decibel level, as long as plaintiff agreed to abide by the Parks' Department's usual noise regulation. Plaintiff agreed and the injunction proceeding was settled satisfactorily for both parties.

11. The entire matter was then placed on the suspense calendar because the Parks' Department had decided to amend its regulations to conform the regulatory language with the agency's practice and limiting construction. This decision to review the regulations was not a concession that the regulations, as framed, were unconstitutional. Part of the Court's first amendment con-

stitutional calculus is an evaluation of the implementing agency's interpretation and application of its rules. *See, e.g., Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 503-504 (1982). The regulations as interpreted by the Parks' Department were constitutional. In any event, this issue has since become moot.

12. The proposed amendments to the regulations were finally approved by Commissioner Stern on or about March 19, 1986. A copy was hand delivered to plaintiff the next day, and the proposed amendments are currently undergoing the notice and publication requirements set forth in the City's Administrative Code. Plaintiff has yet to indicate its intention regarding its mooted 1985 complaint. By the instant motion, plaintiff now seeks to challenge the Use Guidelines which apply only to applications for use of the Bandshell.

13. First amendment rights are subject, as plaintiff must concede, to reasonable time, place, and manner restrictions. Regulations governing length and hours of the event, vehicle permits, permissible sound equipment, clean-up bonds, and liability insurance are time, place, and manner restrictions. As demonstrated in the annexed affidavit of Joseph Killian, the Use Guidelines survive constitutional challenge here because, *inter alia*, they further significant governmental interests. Mr. Killian was recently hired by the Parks' Department to fill the new position of Program Director for the Mall/Bandshell/Bethesda Terrace. In this capacity, Mr. Killian, who previously was both a performer and an independent consultant on special events' productions, researched, drafted, and revised the Use Guidelines now challenged by RAR. The Use Guidelines attempt to accommodate the interests—at times countervailing—of park users, nearby residents, and persons who wish to attend performance events in the park. While first amendment rights are obviously paramount, the guidelines strike a balance between the competing interests.

14. In addition to demonstrating the significant governmental interests underlying the challenged guidelines, Mr. Killian's affidavit, and the accompanying memorandum of law

illustrate that the regulations are content neutral—applying to all forms of speech—they are narrowly drawn, and they leave open ample channels of communication. Plaintiff's principal complaint appears to be that it is unhappy that it cannot use its own sound equipment. I am unaware of a constitutional right to use one's own sound equipment. Furthermore, because plaintiff may use the Bandshell on May 4, 1986, if its motion for injunctive relief is denied, it is difficult to perceive the irreparable injury that will result.

15. Citation to the first amendment is not a talisman entitling plaintiff to relief. The facts and the law both overwhelmingly indicate that plaintiff's claims are meritless. Accordingly, it is respectfully requested that plaintiff's motion for preliminary injunctive relief be denied. Then perhaps, plaintiff can focus upon is its stated goal: the expression of constitutionally protected speech. Defendants are ready to aid plaintiff in this endeavor in every reasonable way possible.

s/ Chad A. Vignola
CHAD A. VIGNOLA

Sworn to me before this
29th day of April, 1986

s/ Kay Donaghy
Notary Public

KAY DONAGHY
Notary Public, State of New York
No. 24-4827974
Qualified in Kings County
Commission Expires March 30, 1987

Joint Exhibit 1 Submitted In Evidence On March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
Exhibit A Annexed to the Affidavit of Chad A. Vignola—Stipulation for Partial Settlement

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff

- against -

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, et. al.
Defendants.

STIPULATION OF PARTIAL SETTLEMENT

85 Civ. 3000 (CSH)

WHEREAS, plaintiff Rock Against Racism has applied to the City of New York Department of Parks and Recreation ("Department") for a permit to use the Central Park Bandshell (the "Bandshell"), located near 72nd Street and Central Park West, on Sunday, May 5, 1985, for a political event during which speeches will be made and music played; and

WHEREAS, since 1979 plaintiff has filed applications to stage similar events at the Bandshell, and pursuant to permits issued by the Department have staged such events; and

WHEREAS, on or about April 9, 1985, the Department denied plaintiff's permit application for use of the Bandshell and instead offered plaintiff the use of either Wards Island or Randalls Island; and

WHEREAS, the Department's decision to deny Rock Against Racism's 1985 permit application was based on alleged

recurring excessive noise at the prior concerts; alleged recurring post-event inadequate clean-up by Rock Against Racism at the prior concerts; alleged recurring problems with crowd control at prior concerts; and alleged recurring violations of other Rules and Regulations of the Department; and

WHEREAS, plaintiffs deny all allegations made in the fourth "**WHEREAS**" clause of this stipulation; and plaintiffs contend that the Department's Rules and Regulations are unconstitutional; and

WHEREAS, the Department believed that Rock Against Racism had failed to abide by past agreements to correct the repeated deficiencies; and

WHEREAS, Rock Against Racism has filed this law suit challenging the Department's refusal to grant them a permit to use the Bandshell area in 1985, and the parties being desirous of reaching an amicable resolution thereof;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the parties hereto as follows:

1. The Department agrees to issue to Rock Against Racism a permit to use the Bandshell area for the purpose stated above on May 5, 1985. The permit is subject to strict compliance with its terms and with all applicable Parks Department Rules and Regulations, including the Regulation directed towards excessive noise, which shall be construed and enforced in conformity with applicable judicial interpretations of the definitions contained therein. . The event will consist of amplified music and speeches, during the hours from 12:00 noon to 6:00 p.m. on May 5, 1985.

2. At the concert, the sound level will be monitored by the City of New York Department of Environmental Protection (DEP) using LEQ decibel meter devices. Rock Against Racism shall be permitted to have one representative present while DEP monitors the sound level. The Rock Against Racism representative shall not interfere in any way with DEP's monitoring.

3. The plaintiffs will set up for the concert in accordance with guidelines including, but not limited to, the location and type of equipment to be used, as set out by the Parks Department. Rock Against Racism agrees to use its best efforts to transport its equipment, including the Rock Against Racism sound system, into the Park between the hours of 6:00 a.m. and 10:00 a.m. The Parks Department will allow the plaintiff adequate time before the scheduled event to set up and test the necessary equipment and will not unreasonably interfere with the set up of such equipment. The Department also will provide plaintiff with adequate time and equipment to clean up after the conclusion of the performance at 6:00 p.m.

4. Pursuant to Article II, §3(d) of the Parks Rules and Regulations, Rock Against Racism will be required to post an undertaking in the amount of $1000.00, no later than May 2, 1985. The parties understand that the permit is herein granted subject to revocation in the event that the undertaking is not timely paid in full.

5. The Department agrees to issue Rock Against Racism the following vehicle permits to bring vehicles into Central Park on May 5, 1985: permits for (1) ten vehicles making a total of eighteen maximum round trips; (2) one vehicle making a total of four maximum round trips; (3) one sound truck; and (4) one flat bed truck. Rock Against Racism agrees to use its best efforts to drive safely and to minimize the total number of vehicle trips through the park, and the Department agrees to use its best efforts to secure a parking spot for one Rock Against Racism emergency vehicle near 72nd Street and Fifth Avenue. No Rock Against Racism vehicle will permitted *to enter* after 5:00 p.m. on May 5, 1985

6. This Stipulation of Settlement shall be "So Ordered" by the Court.

7. This Stipulation shall be admissible in any future litigation between the parties.

Exhibit A Annexed to the Affidavit of Chad A. Vignola—
Stipulation for Partial Settlement

Dated: New York, New York
May , 1985

GOMBINER & AVENIA
Attorney for the Plaintiff
177 Prince Street
New York, N.Y. 10012
(212) 677-1006

BY: s/ Mark B. Gombiner
MARK B. GOMBINER

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007
(212) 566-0745

BY: s/ Chad A. Vignola
CHAD A. VIGNOLA
Assistant Corporation Counsel

SO ORDERED: 5/1/85

s/ Charles S. Haight, Jr.
U.S.D.J.

Joint Exhibit 1 Submitted In Evidence On March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
Exhibit B Annexed to the Affidavit of Chad A. Vignola—
Transcript of the Proceedings on April 26, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

- against -

HON. BENJAMIN R. WARD, *et al.*,
Defendants.

85 Civ. 3000 (CSH)

April 26, 1985
2:40 p.m.

Before:

HON. CHARLES S. HAIGHT, JR.,
District Judge

APPEARANCES:

FOSBINDER, SCHACHTER, WALKER & WINKLER
Attorneys for Plaintiff
JAMES H. FOSBINDER
and by:
GOMBINER & AVENIA
Local Counsel
MARK B. GOMBINER
PETER AVENIA

OFFICE OF THE CORPORATION COUNSEL
OF THE CITY OF NEW YORK
Attorneys for Defendants
CHAD A. VIGNOLA
SUSAN R. ROSENBERG

(2) THE COURT: The record should reflect that I have met with counsel in the robing room and had an off-the-record discussion at spme length.

I think it right to tell the other spectators in the court who are interested in the case that the function of that discussion was to further explore the possibility of an amicable resolution of disputes at this time, and, if that should fail,—and for the present, at least, it has failed—to work out a further identification of the issues and the manner in which we will proceed in the case formally. So that is what we have been doing.

And we will now, in the present state of affairs, proceed formally, and I will ask the defendants to call their first witness.

MR. VIGNOLA: Your Honor, defendant calls Robert Russo.

ROBERT RUSSO, called as a witness on behalf of the defense, having been first duly sworn, testified as follows:

MR. VIGNOLA: May I proceed, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. VIGNOLA:

Q. Mr. Russo, by whom are you presently employed?

A. By the New York City Department of Parks and (3) Recreation.

Q. And in what position are you employed?

A. My title is Assistant Parks Commissioner for Citywide Services.

Q. And how long have you held that position?

A. Approximately eighteen months.

Q. What are your duties and responsibilities in that position?

A. They are varied. I have several divisions of the agency under my control, everything from lifeguards to our technical services people, special events, our enforcement people, our security people, and a large chunk of the budget.

Q. And what position did you hold prior to becoming the Assistant Parks Commissioner?

A. I was head of the Urban Parks Service, which is part—in the Parks Department, which were the Rangers and the parks enforcement patrol and the communications in the department, radio communications.

Q. How long did you hold that position?

A. I have been in the department for four years. I had that position for about two of those years.

Q. And what were your duties and responsibilities in that position?

A. Again, they varied. But we were to enforce all (4) Parks rules and regulations with the Parks Enforcement Patrol. The Rangers, as you may know, got—have tours in the parks, guided tours. They take school children on tours of the parks. Environmental education. We also have communications division that I ran.

Q. Could you briefly tell the Court, Mr. Russo, what your educational background is?

A. Yes. I'm a graduate of Manhattan College, bachelor's degree, Liberal Arts. I have a master's degree.

Q. Excuse me. If I could interrupt. What year was the bachelor's?

A. 1967.

I have a degree from C.W. Post College, major in Criminal Justice, 1974, and some other postgraduate work.

Q. Mr. Russo, in your capacity as Assistant Parks Commissioner, do you become involved in various events that are staged in Central Park?

A. Yes, I do.

Q. How do you become involved in those?

A. Well, I was directly involved for the last three years or two and a half years in control of the events and the security of the events, from the Parks' point of view, for many events in the agency, literally hundreds. And since that time, I have been promoted, so I'm indirectly—there are people who had the job that I have—that I had.

(5) Q. What type of events are you talking about?

A. Everything from road races to philharmonic concerts.

Q. And do you have any regulations that apply to use of the park during these events?

A. Yes, we have many regulations that apply. We try to—The regulations are aimed at controlling the events, so that it's done safely,—essentially, that's it—and that people enjoy it.

Q. Specifically, are there any regulations with respect to the granting of permit applications?

A. Yes. We have regulations that have to do with time and place of the event, the site. Some events are more suitable for one

location than another. Time of day, time of year. Weather is a controlling factor also for us. And number of vehicles that are allowed. We try to get an estimate of the number of participants, so we know how many people we have to employ for clean-up and for security. So there are a broad range of conditions.

MR. VIGNOLA: If I may approach the witness, your Honor.

THE COURT: Yes.

(Defendants' Exhibit A was marked for identification)

Q. Mr. Russo, can you identify that exhibit?

(6) A. Yes. This is the Parks Department list of major special events that are conducted under the auspices of the Department of Parks on our property, essentially.

Q. Are you familiar with the preparation of that document?

A. Yes, I am.

MR. VIGNOLA: Your Honor, I offer Defendant's Exhibit A into evidence.

THE COURT: Show it to counsel.

MR. VIGNOLA: Yes, I'm sorry.

(Pause)

MR. GOMBINER: No objection.

THE COURT: Received.

(Defendant's Exhibit A was received into evidence)

Q. Mr. Russo, is that a complete list of all the activities in the park?

A. No, it's not. It is the major events that we—generally, the ones that we list are the ones that we know about in advance.

They are of some magnitude. They require our participation and some planning. There are hundreds of other smaller events that we don't list.

Q. In applying the rules and regulations to the various events that take place in Central Park, what factors do you take into account?

(7) A. I'm sorry?

Q. In applying the Parks Department's rules and regulations, for example, you talked about the time regulations. How do you determine what is an appropriate time to apply to a particular permit application?

THE COURT: Need we get into that, do you think? Is that a contested issue in this case? What I want to do is focus, in the limited amount of time we have, only upon—

MR. VIGNOLA: I'm sorry, your Honor.

Q. Are there noise regulations with respect to the granting of permit applications?

A. Yes, there are.

Q. And do those noise regulations apply to all events in Central Park?

A. They do apply to all events, yes, for amplified music.

Q. And in applying those regulations to particular events, what considerations do you have to take into account?

A. What we take into account is, again—you mentioned the time of day. That's important. We take into account the size of the crowd, how far the level of the music or the sound has to reach or is expected to reach.

Those are the kinds of things we take into effect—into consideration.

Q. When you say that you take into account the size (8) of the crowd, how does the size of the crowd vary the loudness of the noise?

A. Well, for example, if you have a major concert, let's say, on the Great Lawn in Central Park, you would need more amplification for that than you would in the Band Shell, because you may have 100,000 people. So naturally, for a philharmonic, you would need larger speakers, have some speakers set up around the lawn. And some concerts, we have done that and focus those speakers in on the crowd rather than the perimeter. So the people in the area can hear, but you don't necessarily hear on Central Park West or Fifth Avnue or other places.

Q. And how does the time of day vary?

A. Well, we try to give consideration to people who live around the park, because every single week, just about, from now on, we will have some kind of event in the park. And we get constant complaints—it's not just with this group, by no means—all the time about people trying to relax, trying to read the paper. Sound seems to carry up to a lot of these tall buildings. So we even get complaints about the road runners with their bullhorns at nine o'clock. So we try to manage those things so that they're not—so that you can enjoy living around the neighborhood, that you're not annoyed every single weekend.

Q. And how do other events in the park impact on (9) your decision?

A. Well, I'll be very specific. In the Band Shell, there are areas very near the Band Shell that we have set up what we call passive recreation, such as the Sheep Meadow. It's about a thirteen-acre plot of land. People sun themselves, read books, sit down. There is no organized—there are no organized sports allowed in that area. That is about three or four hundred yards from the Band Shell. It's southwest. And loud performances from the Band Shell would affect the Sheep Meadow. It is akin to

somebody sitting down next to you when you're trying to take a nap with a loud radio.

Q. Well, if I could back up a minute. Are there musical events that are held in other areas of the park?

A. Yes, primarily the Great Lawn. There are small grass concerts that are held at the Dairy. There is an overhang, what is called a loggia, outside the Dairy building. And they have little combos that perform there in that area.

The Band Shell, the Great Lawn for the big concerts. There's more room.

Those are the principal areas where we have concerts in Central Park.

Q. Are those places the same distance the Sheep Meadow is to the Band Shell?

A. No, they're not. The Dairy is a little bit (10) further, and it's actually east of the—it may be a couple of blocks away.

The Great Lawn begins at 79th Street. So the Band Shell is approximately 72nd Street. So that's about seven blocks away.

Q. Now, concerts that are held at the Great Lawn, which way does the music face, if you understand my question?

A. It faces west, because the Band Shell, which is acoustic, by the way, in and of itself faces west.

Q. I'm sorry?

A. The BandShell is sometimes used by groups without amplification, because it is an acoustic band shell. It was designed to amplify sound.

Q. If you were to hold a concert at the Great Lawn, which way would the music be?

A. Faces north, generally north.

Q. If I could direct your attention to May 5th, 1985, the upcoming May 5th, do you know what events are scheduled for that day in Central Park?

A. The ones that are known to me are right on the perimeter of the park will be a rally for Soviet Jewry at 64th and Fifth Avenue. There are a lot of people that assemble each year, I think.

There is a jazz concert at the Dairy.

And there is a bike-a-thon, cerebral palsy (11) bike-a-thon, where people come at 8:00 o'clock in the morning, and they bike and you sponsor them for how many miles they do around the park.

Q. And on any given weekend, are there a wide variety of events?

A. Every weekend from now on, you have a large list of events. We have a very busy weekend coming up, for example.

MR. VIGNOLA: Your Honor, if I could have one moment.

THE COURT: Yes.

(Pause)

MR. VIGNOLA: If I could just have a few more questions, your Honor.

THE COURT: Surely.

Q. Mr. Russo, are you familiar with Rock Against Racism's permit application?

A. Yes.

Q. And what area is that to use?

A. I'm sorry?

Q. And what area did they apply to use?

A. They applied to use the Band Shell area, Central Park.

Q. Do you know how many hours they have requested to use the Band Shell area for?

(12) A. I believe it is six.

Q. And what hours?

A. I shouldn't say—May I change that? It's six hours.

THE COURT: All we are concerned with is the truth, if that will assist you.

A. (Continuing) The performance is six hours, but the time that they need to use it, I think, is from 6:00 in the morning to 6:00 at night, because there is setup time starting early in the morning.

Q. And does the Parks Department have any regulations that apply to the timing of events in Central Park?

A. What we try to do is, when we have concerts, musical concerts, we keep them to appoximately two hours. That is something that we have done with, I think, all of the concerts that I have been involved in, musical concerts.

This is somewhat different.

There are other events, where we have religious ceremony, and there is a mass involved, for example, and sometimes that goes longer, because it's co-celebrated, and we have more hours with that. But it's not just music. There may be some singing with it.

THE COURT: As you understand Rock Against Racism's application for next May 5th, you said six hours of performance is requested?

(13) THE WITNESS: Yes, your Honor.

THE COURT: Which hours are those?

THE WITNESS: From noon to 6:00.

THE COURT: Noon to 6:00. All right. Thank you.

Q. What is the reason that you have time restrictions imposed on permit applications?

A. Several.

One is that the Band Shell is used—That area is rather large. It is used by a lot of people. We try to give people an opportunity to use the area and not to isolate it for many, many hours. There are a lot of spontaneous groups that perform there without amplification.

There comes a time when any music, no matter what your taste is, after several hours, it becomes—it begins to be a bit much. So we try to limit performances, all the performances, because there are hundreds—it's been estimated there are 250,000 people that use the park on a Saturday or Sunday when the weather is good.

What we try to manage is that everybody has a good time, that we don't interfere with one another's taste.

Q. And in doing that, did you request that the Rock Against Racism participants use the Band Shell area for music purposes for less than the full six hours?

A. I am requesting that the music part of the performance, it would be a good idea and not unreasonable, (14) that that be collapsed somewhat. If someone wants to speak with amplification, you don't need the kind of amplification or the kind of sound that you get with music. It appears to me to be a difference.

MR. GOMBINER: Judge, I'm going to object to what appears to Mr. Russo.

THE COURT: Well, what are your reasons for saying that? May be more than sheer appearance. Why did you say what you just said?

THE WITNESS: Well, the Parks Department,—I represent the Parks Department—we don't feel we should abridge anybody's right to speak for as long as they can reasonably do that without disturbing anybody else. But I think that music is different, that that can annoy other people. I know that it sometimes annoys other people, any kind of music.

Q. Well, has the Parks Department ever gotten complaints from people for use of the park for music purposes?

A. Oh, yeah, we get complaints all the time.

Q. Now, why does the Parks Department seek to have 6:00 o'clock cut-off of the Band Shell use?

A. I think because that's the time of day that it begins—people go home to have dinner, it begins to get dark. And it seems reasonable that if you're having a (15) performance, 6:00 is a reasonable time. You have to stop somewhere, and we think that that is fairly reasonable, and everybody is happy with that.

MR. GOMBINER: Objection to what everybody is happy with.

THE COURT: I will disregard the last phrase.

Q. Are there any clean-up requirements at these concerts?

A. What we do is, we try the best of our ability, if the group doesn't clean up or they post a bond,—we usually get help from a lot of groups—we try to get the park cleaned up on that tour. Our people go off at 11:00 o'clock. So they'll come in right after an event and clean up till 11:00. That's important to us, because it costs us men if it comes—have to have another crew come on. So we try to do it in a few hours so the park is clean the next day.

MR. VIGNOLA: I have no further questions at this time, your Honor.

THE COURT: All right, cross-examination of this witness.

MR. FOSBINDER: Thank you, your Honor.

CROSS EXAMINATION:

BY MR. FOSBINDER:

Q. Mr. Russo, when did you deny the permit to Rock (16) Against Racism?

A. I believe it was a couple of weeks ago in April. April 9th or 10th.

Q. You spoke with me on the telephone; is that right?

A. I don't know who you are.

Q. Fosbinder.

I'm sorry. My name is James Fosbinder.

A. No, I don't believe I spoke to you.

Q. Our recollections differ.

A. Might have been Sheldon Horowitz.

Q. You're right.

A. He's the permit person for the Borough of Manhattan.

Q. You denied the permit two weeks ago; is that right?

A. The agency did.

Q. When was the permit application filed?

A. I think in January, but I'm not certain.

Q. Why did it take so long to decide to turn it down?

A. We have thousands of permit applications. That's the best answer I can give you.

Q. Surely, you're aware that people put a lot of time and effort into these events. This was an ongoing (17) struggle of some

seven years, it's been occurring here. And yet you waited until two weeks because of the press of other permits. That was the only—

MR. VIGNOLA: Objection, your Honor.

THE COURT: I sustain the objection to the form. It is argument.

MR. FOSBINDER: Yes. Excuse me.

Q. Can you tell me what sort or written standards you used to turn down this application?

A. We have Parks rules and regulations, and there is a section in there—

Q. What section?

A. The number of it escapes me, but it has to do with sound, amplified music.

Q. And specifically, how was that relevant?

A. I'm sorry?

Q. Specifically, how did that tell you to turn down this application?

A. It tells you that level of sound that is excessive can be regulated, essentially. That's a paraphrase of what is there.

Q. Can you describe this regulation process to me in a little more detail?

A. I can describe what we did last year, and maybe that will get to the heart of the matter.

(18) Q. All right, what did you do last year?

A. Since there was a history, which is in dispute of confrontation between this agency and this group, we had a meeting in the Central Park Precinct with the members of this group. And we decided that representatives from the Parks Department and the

Police Department and the group would agree upon a sound level that would be sufficient so that you could hear the performance to the rear of the Band Shell, which is a large area, couple of—

Q. Could you explain what you mean by "hear" it?

A. If you stood in the back, you could hear the music from the Band Shell.

Q. Just hear? Nothing beyond "hear"? What sort of decibel level? Do you have any—

A. Well, there was a representative from that group. I wasn't present, but there was a representative from the group and three representatives, essentially, and somebody from the Department of Environmental Protection and they agreed to a decibel level.

Q. What would have happened if they didn't agree to—

A. So it was a mutual agreement. They listened, and they agreed to that.

Q. What would have happened if they didn't agree to that decibel level?

(19) A. I don't know. I can't conjecture.

Q. Okay.

A. It was—

THE COURT: Wait for the next question.

THE WITNESS: Sorry.

Q. You've said that one of the problems was that this event was monitored and they exceeded this allegedly agreed to level.

Can you tell me, are all events monitored in Central Park?

A. Yes. Any event that we have a person at, we monitor the sound level in a number of ways. We have people there. We

have—We listen. If people come up and complain to us, we respond to that and we will listen.

Q. And the decibel level is always the same?

A. We ask people to lower the sound. We don't measure with meters. This was something unique, and we had a past history, and we said, "Let's do it scientifically."

Q. So previously, you hadn't had decibel readings?

A. Not to my knowledge, we hadn't done that.

Q. What standard did you use?

A. An agreement between two people that it's excessive, that you don't need sound to go two blocks beyond where your event is being staged.

Q. So prior—

(20) A. That's the kind of agreement.

Q. Prior to this agreement, you used a standard which was not scientifically determined?

A. That's correct.

Q. So this was the first time that anyone would have had—

A. That I know of.

Q. Was this the first time that anyone would have had the opportunity who didn't personally own a decibel meter to know what sound level meant what at that location?

A. As far as I know.

Q. Okay. Did you have anything to do with approving, for instance, the Diana Ross concert?

A. Some. I was involved in it, yes. I was involved at that time in the security, from the Parks' point of view, which, essentially,

we control the backstage area, the safety line that is maintained in the middle of the event that size, and access to the stage and backstage. That was my role at the time.

Q. Did you have anything to do with setting the volume level for that event?

A. No.

Q. Are there—To change the topic here for a moment, are there areas in Central Park which have traditionally been used for gatherings for protests, demonstrations, (21) similar events?

A. I would say yeah, principally the Band Shell is a place, because it is a place where you can stand. There is no grass in there. It is hexagonal. And there is seats there, around—it's a semicircle, and there are some seats where people can sit and listen. So I would say that that, and, of course, Grand Army Plaza, which is just outside of the park, is a place where people make speeches.

I don't know that it's designated as such, but it has happened over the years.

Q. Now, I'm a little puzzled. You said that the reason this group wouldn't be allowed to play after—4:00 o'clock, as I understand, is what you're asking for now; is that correct?

A. Yes.

Q. —4:00 o'clock, was because people—it's a residential area near there, and it could be disturbing to people?

A. No, that's not what I said. You must have misunderstood me.

What I was suggesting was that our policy is that most concerts are about two hours, an hour and a half or two hours. And those people seem to pay attention. They enjoy, and then they go elsewhere, and other people can pass through without having to work their way through a crowd. (22) And that's been a reasonable policy. We haven't had problems with other groups on that.

And this group has now six hours. And what I'm asking is, why not, if the music and the sound level of music is a problem, it is a problem for us, why not cut the music portion to four hours, so that at 4:00 o'clock, the music stops, but you still have amplified voice, and you can continue with speeches. It is longer than other performances.

Q. Is the time of day any problem? Is there no problem with going later at night? Are there events held at night? Let me ask you that.

A. No, not generally. There is some runs that are held in the nighttime, but not musical performances.

Q. In the schedule which you've given us, there will be opera performed at the Band Shell between 7:30 and 10:30 at night.

A. You're right, there is the grand opera. There are three performances. I'm sorry.

Q. Does that require sound amplification equipment?

A. Yes, they do.

Q. And what sort of standard would that be held to?

A. We don't—If you're asking whether we measure decibel levels, we don't.

Q. Not for opera?

A. The performance isn't very loud, though. It (23) reaches to the back of the Band Shell.

Q. Are you—

A. There are people that don't like opera who complain to us, if that's what you're asking.

Q. Yes, that certainly is one of the points I was getting at.

But you have made no arrangements whatsoever for this group to monitor their sound level?

A. Last year, not—

Q. No,—

A. Oh, you said this group.

Q. Yet there were complaints made?

A. And they quiet down if there are complaints. You know, we ask people to quiet down the sound, and they do it.

We have a group that tends to get loud in June called the San Juan Fiesta, and we ask them, and they turn it down if we request them.

Q. Does it seem possible to you that many more of the residents of Central Park West appreciate opera than hard core punk music?

A. I don't know.

Q. You have no idea?

A. I don't know. I've never taken a survey.

Q. You don't know the tastes—

(24) A. It's the sound level. Has nothing to do with the taste of the community.

Q. How do you determine something is so loud?

A. Are you asking if the—

Q. I'm asking how you determine whether or not something was too loud. How do you determine whether the opera was too loud?

A. If we get complaints from people.

Q. And how can you differentiate whether these people are complaining because it's to loud or because they don't like it?

A. We don't.

Q. You said that every week, events generate complaints about noise, including running events. Is that correct?

A. Yes. Announcements about the runs, sometimes the sound gets very, very loud, and it's early in the morning. And that's why time is very important. What doesn't disturb you at noon might disturb you at 8:00 or 9:00 o'clock in the morning.

Q. But not between 7:30 and 10:30 when the opera is allowed to play, that's not a critical time.

MR. VIGNOLA: Objection.

MR. FOSBINDER: Yes, I'm asking a question.

THE COURT: Rephrase it.

(25) Q. Do you experience more complaints about music events held at night than during the day?

A. Well, firstly, no, I would say not. Either because of the nature of the event, or the fact that we don't have that many at night.

Q. But you have no way of telling which reason?

A. No.

Q. You've indicated, and the papers filed have indicated, a problem with clean-up for this group, and that this is somehow relevant to the determination of the permit application. Is that correct?

MR. VIGNOLA: Objection.

THE COURT: I am not sure that is what the witness said. Why don't you rephrase it and ask him whether or not.

Q. Have there been problems with this group cleaning up after their performance?

A. I am informed of that. I haven't got firsthand knowledge of that.

Q. Can you tell me why all of their bond is given back every year if that was the case?

A. I can't explain that.

MR. FOSBINDER: All right, let me confer with counsel, if I may.

THE COURT: Yes.

(Pause)

(26) MR. GOMBINER: Your Honor, with the Court's permission, may I inquire of the witness, or would you prefer that one—

THE COURT: I will permit it on this one occasion, but the practice that I usually follow and will do from this point on is to require that one counsel or the other handle a witness. I do not usually permit—

MR. GOMBINER: Well, Judge, I'll give the questions to Mr. Fosbinder.

THE COURT: That is better. Let's stick to that rule and regulation, yes.

(Pause)

Q. I call to your attention a rule, as I understand it, of the Parks rules and regulations, Number 3, Subsection D.

MR. FOSBINDER: May I approach the witness?

THE COURT: Yes.

We had better get the rules in evidence and make them a formal part of the record.

MR. FOSBINDER: I can do that while he refreshes his recollection.

(Plaintiff's Exhibit 1 was marked for identification)

MR. FOSBINDER: Do you have a copy?

THE COURT: You offer those, do you, Mr. Fosbinder?

(27) MR. FOSBINDER: What?

THE COURT: You offer the rules?

MR. FOSBINDER: Yes, I offer—

THE COURT: Any objection to the offer of the rules?

MR. VIGNOLA: No objection.

THE COURT: I receive the rules in evidence, Plaintiff's Exhibit 1.

(Plaintiff's Exhibit 1 was received into evidence)

Q. Is it not a fact that you—Is it a fact that you are required to issue a permit unless—

And I've got to find it again.

(Pause)

Q. Let me read the correct language. I can't find it right now. It states: "Upon application, the Commissioner shall issue a permit, unless the proposed event will present a clear and present danger to the public health or safety."

MR. VIGNOLA: Objection, your Honor. That's not the entire section.

THE COURT: No, that is true, for the sake of the record.

MR. FOSBINDER: That's correct. "Proposed event will substantially interfere with the use and enjoyment of (28) the park by the public."

Is there another section that you call relevant?

MR. VIGNOLA: Yes, 2 and 4. I'm sorry. Not 4. 2 and 3.

THE COURT: Well, rather having colloquy of counsel, if you want to ask this witness what provisions of the the rules he relied upon in denying this permit, that is what I am interested in.

Q. All right, what section did you rely upon?

A. Can I look at it?

Q. Yes.

MR. FOSBINDER: If I may approach the witness?

THE COURT: Yes.

A. Thank You.

(Pause)

A. 1-D-1.

Q. Which reads?

A. "The proposed event would substantially interfere with the use and enjoyment of the park by the public."

Q. Wouldn't, for instance, the Diana Ross concert interfere a great deal more?

MR. VIGNOLA: Objection, your Honor.

Q. Would—I'm sorry—Would—

MR. VIGNOLA: If I may, this is all irrelevant. We have gone beyond the point of the denial of the permit.

(29) My understanding was, we were discussing the noise regulation. It all seems irrelevant at this juncture.

THE COURT: I do not think so. It may go to an argument that plaintiffs may offer that as the stated reason to protest. I will permit the inquiry.

MR. FOSBINDER: Thank you.

A. Could you say that again?

Q. Would an event, such as the Diana Ross concert, which attracts a great deal more people and uses a sound system much larger, interfere more with the use by other people seeking a quiet place to go?

A. It's two hours, as opposed to six hours. It's not just a matter of sound. It's a matter of length of time that it interferes.

Q. For what period of time, during the Diana Ross concert, were the people in the park?

A. The performance was an hour and thirty minutes. And probably about two hours, two hours and a half.

Q. And why was that event ended, rain?

A. It was a storm, and it was dangerous, so—

Q. So what length of time would that even have drawn a large crowd to the park, it it had not been for the bad weather, in your experience?

A. Oh, the event, it was still an hour and thirty minutes. It was scheduled for an hour and thirty minutes. (30) That was live on TV.

Q. Let me ask another question.

How long before that event did the crowd begin to gather?

A. Probably an hour or two. Probably two hours before.

MR. FOSBINDER: Okay, I think that's all, your Honor.

THE COURT: All right. Redirect?

MR. VIGNOLA: Yes. Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. VIGNOLA:

Q. Mr. Russo, were you—

MR. VIGNOLA: Excuse me. Withdrawn.

Q. Do you know whether the clean-up bond was, in fact, defaulted in 1980 for Rock Against Racism?

A. I don't know the answer to that.

Q. Why don't you know the answer to that?

A. Because I wasn't in the Parks Department in 1980.

Q. Do you know if the Department of Environmental Protection monitors sound level at any event?

A. The only one that I can recollect is the Rock Against Racism event of last year, because it was agreed that that happen.

Q. Do you know whether the agreed to decibel level (31) was communicated to Rock Against Racism at that time in 1984?

A. People have told me that there were at least—

MR. FOSBINDER: Objection.

A. I don't know directly. I was not there. I was told by people who worked for me that Race Against Racism—

MR. FOSBINDER: Objection.

THE COURT: Yes. I will not consider the answer.

Q. Do you know how many people were at the Diana Ross concert, approximately?

A. Two to three hundred thousand, I'd say.

Q. Do you know approximately how many people were at the Rock Against Racism concert?

A. Two thousand.

Q. What time of day was the Diana Ross concert?

A. It was—began at 6:00, 6:00 p.m.

Q. And what other events were scheduled for that evening in the park?

A. Which evening?

Q. I'm sorry. For the night of the Diana Ross concert, were there any other events scheduled in Central Park that you're aware of?

A. I don't think so. None that I am aware of. I would doubt that there would be any.

Q. Do you know what the cost would be to measure with a decibel meter the sound level at every event in Central (32) Park in a year?

A. I have no idea. There are at least 200 events. They are all not musical, however. But I suppose it would be considerable.

Q. Are there other factors, besides complaints by residents, that you take into account in determining what might be excessive noise at a given event?

A. Well, I had mentioned previously, we have—we sometimes get complaints by people who live around the park. We get complaints by people who just want to sit down and who are passing through the park or using the park. That kind of stuff.

MR. VIGNOLA: I have no further questions, your Honor.

THE COURT: Anything further from plaintiff?

MR. FOSBINDER: Yes, your Honor.

RECROSS-EXAMINATION

BY MR. FOSBINDER:

Q. How many people complained about Rock Against Racism last year?

A. I don't know.

Q. Do you have any idea?

None. All right.

Can you describe the complaint-taking procedure at all?

(33) A. Well, calls generally. The complaints generally go into the Central Park Precinct Station House. It's usually where people call in the first instance. And then there is a person at the switchboard who takes the complaint and notifies somebody who is in a patrol sector to respond, "A complaint of noise."

Q. Do you know if the majority of complaints are anonymous or whether the people identify themselves?

A. It's probably about fifty-fifty. Some people will give their names, others don't.

Q. Do you have any way of telling whether the people who don't identify themselves are simply calling up again and again or are separate people?

A. No. I don't have any way.

MR. FOSBINDER: Okay. Thank you.

Excuse me.

(Pause)

Q. Do you have any knowledge of anyone who was using the park last year complaining about the sound levels of Rock Against Racism?

A. I have been told. Direct knowledge, no.

MR. FOSBINDER: Thank you.

MR. VIGNOLA: One more question.

THE COURT: Sure.

MR. VIGNOLA: Thank you.

(34) REDIRECT EXAMINATION

BY MR. VIGNOLA:

Q. Mr. Russo, in determining whether to refuse the Rock Against Racism permit this year, was that based on your understanding that Rock Against Racism had refused to abide by an agreement last year as to a set decibel level?

A. Primarily, yes.

Q. Were there other considerations?

A. Yes. We—

THE WITNESS: Can I go on?

THE COURT: You may.

A. There was—I knew of a history of problems in this permit procedure with this group. I thought we could solve it by sitting down and agreeing on something for last year, and we did that in advance of the event, and we granted the permit. And it looked like it was going to work out, and it was breached again. And that's why we're here.

MR. VIGNOLA: I have no further questions, your Honor.

THE COURT: This is going to require you to repeat yourself a bit, Mr. Russo, but I am going to put the question to you again, anyway, to make sure I understand your position completely.

The present group, Rock Against Racism, applied (35) to have a concert or an event at the Band Shell sometime in January; is that so?

THE WITNESS: Yes, your Honor, I believe it was January.

THE COURT: Right. And had this group used that particular area, the Band Shell area, on prior years?

THE WITNESS: Yes, your Honor.

THE COURT: Do you know for how many prior years?

THE WITNESS: I think for at least five or six years.

THE COURT: And then a time came in mid-April when this permit was refused; is that right?

THE WITNESS: That's right.

THE COURT: Do you know, of your own personal knowledge, why that permit was refused?

THE WITNESS: Yes, your Honor.

THE COURT: Would you, taking your time and using your own words, of course, tell me what the reason or reasons were that played a part in that decision? I want to understand, in as great detail as you can explain to me, what the reasons for the rejection of the permit were.

THE WITNESS: Okay. For the past four years that I have been aware of this event, and my predecessors who were involved in it directly have told me, this group is very difficult to deal with. They're dishonorable.

(36) What that means is when, for example, we ask for a clean-up bond of $1,000 or $2,000 for an event that's going to take place on Saturday, somebody comes at 8:00 o'clock Friday night with a bagfull of dollar bills and change that is far short of the clean-up bond.

Year after year, we've had difficulty with the sound. One year, it was reported to me that there was a performance that took place that was called slam dancing, where people got up on the stage and punched each other and kicked each other and fought and raised a crowd.

One year, I was told a police detail had to be brought in because there was a dispute over turning the sound off. And the people who run the event, who tried at one point to turn if off, could not control their own constituents, so the police had to be called in.

Last year, I decided that I would try to sit down with the people and come to an agreement as to the event, so we could manage it well. The buck had to stop somewhere. We tried to do that.

I feel that the group did not live up to the agreement. They had to be given summonses. They had vehicles in the park that they weren't supposed to have, unregistered vehicles.

It is very dangerous on a Saturday or any week day to have vehicles driving around the park.

(37) They refused to turn the sound down, and I believe they agreed to a certain decibel level.

And my conclusion was that no matter what we did, that they were not going to cooperate with us, even when they agreed to cooperate with us and we thought that they were satisfied. I think it's a very difficult group to control, and I don't know why.

So the decision was made, for all those reasons, not to issue a permit. And then we relented and said that we might be able to control this better on Randall's Island or Ward's Island, because you don't have these large surrounding crowds then, and it's more private, a private place. That was turned down, and we're here.

THE COURT: Have you, to the best of your ability, described for me all of the factors which were in your mind at the time you arrived at this decision?

THE WITNESS: I think so, your Honor.

THE COURT: All right. Counsel may inquire further if they wish.

All right, Mr. Russo. Thank you. You may step down.

(Witness excused)

MR. VIGNOLA: Defendant calls Mr. Milton Schulman to the stand.

MILTON SCHULMAN, called as a witness on behalf (38) of the defense, having been first duly sworn, testified as follows:

MR. VIGNOLA: May I proceed, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. VIGNOLA:

Q. Mr. Schulman, by whom are you presently employed?

A. I am employed by the Department of Environmental Protection. In particular, it's the Division—the Department of Air Resources, Division of Noise Abatement.

Q. And in what position are you presently employed?

A. My line is a psysicist, parenthesis, (electronics)

Q. How long have you held that position?

A. Approximately six years.

Q. And what are your duties and responsibilities in that position?

A. My main duty is to measure noise, to analyze noise, write specifications on noise, computerize our equipment in order to analyze noise more specifically, to do noise contours within the City of New York so buildings can be adequately soundproofed.

Q. When you say "noise contour" studies, can you explain a little bit?

A. Well, noise contours, we measure noise levels (39) over a given period of time, say, twenty-four hours or so. And from a knowledge of the noise levels, the sound energy in the area, we can specify the type of soundproofing, window construction the building should have.

Q. And do any of your duties include enforcement of New York City's noise control?

A. Our division is not an inspection division. There are times, though, that engineers are needed to go out and do sound level measurements. Basically, these are tape recordings which give us a permanent history of the measurement, rather than a simple sound level meter, where the measurement is seen and that's it.

From these measurements, we do certain analyses. We have certain codes to go by. And we do take these things into environmental courts and civil courts.

Q. What position did you hold prior to becoming a physicist for the Department of Environmental Protection?

A. I was an assistant electrical engineer.

Q. And who was your employer?

A. Same people, the same department.

Q. Mr. Schulman, could you briefly tell the Court what your educational background is?

A. I'm a graduate of Polythechnical Institute of Brooklyn. RCA Institutes was a course in advanced technology. I also attended a one-year Naval Aviation electronic training (40) program. I also had a four-week course on noise at City College.

And we've had a number of courses by manufacturers of noise equipment, the use and measurement techniques of this equipment.

Q. Have you ever done any teaching in the noise measurement area?

A. I have recently, from approximately a year ago, conducted a three-day seminar for our Inspection Department. And we did give a course on the physics of noise and the use of noise measuring equipment.

Q. In your capacity as a physicist, do you ever get involved, yourself, in measuring sound levels?

A. Yes, we do. Yes, I do.

Q. Does that include both indoors and outdoors?

A. We do both indoor and outdoor measurements, yes.

Q. On how many occasions would you estimate that you've measured sound levels indoors?

A. Approximately a hundred times over a thirteen-year period.

Q. And about how many events would you estimate that you've measured the sound level at that occurred outdoors?

A. Approximately forty to fifty times.

Q. Did any of these events include musical events?

(41) A. We did answer complaints on musical events, too.

THE COURT: Hold on just a minute, please.

(Pause)

MR. VIGNOLA: May I proceed again?

THE COURT: Yes. Please.

MR. VIGNOLA: Your Honor, at this time, I would like to move to have Mr. Schulman as an expert on sound.

THE COURT: Questions on voir dire?

MR. GOMBINER: Yes, your Honor.

VOIR DIRE EXAMINATION

BY MR. GOMBINER:

Q. Mr. Schulman, what is the RCA Institute?

A. RCA Institutes, which I attended from approximately 1950 to '54, basically was a course in advanced electronics. We did have a course on loud speakers, how they function, design of loud speakers, things like that.

Q. And was that program conducted by the Radio Corporation of America?

A. At that time, yes, it was.

Q. Mr. Schulman, are you a member of any societies of acoustical engineers?

A. No, I'm not.

Q. Do you consider yourself to be an acoustical engineer?

A. I consider myself to be an acoustical consultant, (42) capable of measuring, analyzing noise, recommending soundproofing; a little bit of psycho-acoustics, how a change in noise level affects people, how a change in noise level determines loudness, what increases in noise level can do to people, how they can annoy people, disturb them.

Q. In regards to how noise can annoy or disturb people, have you taken any courses in that area?

A. Most of the courses—There are very few courses in that. There is a lot of literature on this, and a lot of statistics on noise

levels above a given level which would annoy and disturb people. These statistics were arrived at by experts in the field of audiology.

Q. Are you, yourself, familiar with those statistics?

A. Yes, we do use them and we continually read them. The Federal Government uses them. We do use all these guidelines.

Q. And have you read any of that literature, yourself?

A. Yes, I have.

MR. GOMBINER: We have no objection to Mr. Schulman being qualified as an expert.

THE COURT: Yes, I accept him as an expert in the designated field, which is precisely what, Mr. Vignola?

MR. VIGNOLA: The measuring and analyzing of sound.

(43) THE COURT: The measuring and analyzing of sound. I will accept him as an expert in that field.

DIRECT EXAMINATION

BY MR. VIGNOLA: (Continued)

Q. Mr. Schulman, if you could explain to the Court, by what procedure do you measure sound at outdoor events?

A. At outdoor events, we can either use peak sound pressure levels, average levels, the percent of time noise is exceeded for a certain given time.

What we could also use is the LEQ level. And this basically is the sound energy content of the noise measured over a given time period.

Q. When you say the "sound energy" level, is there any way you can explain that a little more simpler?

A. As you know, noise is a random varying signal. It can go high, can be periods of quiet. Noise levels change. The amplitudes continually change.

You can replace the sound energy of that random varying signal by a continuous signal having the same energy content as this random varying signal. This continuous signal which we can use to replace the random changing signal is defined as the LEQ. It's actually a sound energy measurement associated with a given time period. It could be one second, it could be 465 days.

Q. And how do you calculate an LEQ?

(44) A. The LEQ basically is a mathematical calculation. You actually sum up the area underneath the curve, divide by the base, and you get an average level. This can be done today with meters, with equipment,—

Q. If I could interrupt.

A. —with computers.

Q. Does that number that you arrive at have a specific measure? Is that called decibels, in other words?

A. The units of measurement, it's called decibels. Normally, it's A weighted in nature. A weighted decibels means that the sound, the instrument, itself, has the same human response as the—frequency response as the human ear.

Q. Now, you stated that you could measure and arrive at this decibel number by use of an LEQ meter.

A. Right.

Q. Does the Department of Environmental Protection have such meters?

A. In the last four or five years, rather than using our tape recorders and then going into the lab and using computers, meters have been purchased that can measure the LEQ period of time, the LEQ reading of the noise in a given area.

Q. And measuring noise, do you ever have to determine a concept known as loudness?

A. Loudness is a concept that cannot be measured (45) by any meter. There is no way of measuring loudness with any meter, any device. It's actually a subjective interpretation by a human being. There are levels of loudness.

Before I go into that, a sound level meter only measures sound pressure. It does not measure loudness. Whatever kind of sound level meter that's used, whether a simple sound level meter, an LEQ meter, it's strictly sound pressure.

Loudness, it has been determined, can be measured—Well, there's been a lot of research by people in this field. It so happens that a ten-decibel change in sound pressure, ten-decibel, which is a physically measurable quantity, subjectively would sound twice as loud to you. A twenty-decibel change would be four times as loud to you.

It has been arrived at by people in this field actually subjecting people to certain signal levels, increasing that level and, through statistics—and using people with fairly normal hearing, this statistic was arrived at, and it is a recognized statistic in the field.

THE COURT: But even there, there is a subjective element, isn't there, Mr. Schulman?

THE WITNESS: Loudness—

THE COURT: I mean, you're depending on a person to say, "That sounds two times as loud to me."

THE WITNESS: That's right.

(46) Well, this you have to understand. This has been done through statistics. If you subject thousands of people to this experiment and all that, you can fairly and accurately derive, with some confidence, the level that is statistically valid.

It's done in a lot of fields of psychology and a lot of science. The use of statics is the only thing we actually have to use when we can't measure something physically.

Q. Now, Mr. Schulman, did there come a time when you became involved in measuring the sound level at a Rock Against Racism concert at the Band Shell?

A. Yes. We were called in. I think my supervisor asked me if we would help the Police Department take these measurements.

Q. Do you remember approximately when that was?

A. Approximately about a year ago or so.

Q. Do you recall at what time you arrived at the Band Shell at that time?

A. We arrived somewhere between 10:00, 11:00 o'clock in the morning. And there was a reason why we arrived that early.

Q. Why was that?

A. Well, we did—my partner and I, we did walk around the park and get some idea of the average noise levels (47) in various areas of the park prior. This would be called the ambient or general background noise levels in the park.

Q. Do you remember approximately what that ambient noise level was?

A. It varied anywhere from 55 DBA to 60, 62 DBA.

THE COURT: In various areas of the park, 55—

What did you say?

THE WITNESS: To 60, 62 decibels.

THE COURT: Thank you.

Q. Now, from what point had you decided to measure the sound level at the Rock Against Racism concert?

A. We selected a point approximately twenty-five, thirty feet behind the audience, which was approximately the perimeter of the people listening to this concert.

We did monitor it at that time at that point. It was approximately 250 or 300 feet from the Band Shell, possibly less.

Q. Why did you choose that point?

A. Well, we chose that point in order to make sure that the people who are listening to this can adequately hear this sound without being disturbed by other sounds in the park, the levels would be high enough for their listening pleasure; at the same time, people who are using that park wouldn't be disturbed by the noise, or there would be no intrusive noise.

(48) Also, from a quick calculation, the New York City Noise Control Code has what you call ambient noise quality levels at residential property lines. And we felt by having this level selected at the perimeter of that location, our ambient noise quality zones at these residential property lines would be met. In other words, everyone would be happy.

Q. And what equipment did you use to measure the sound level?

A. We basically used an LEQ meter.

Q. And what does that LEQ meter measure?

A. Again, that LEQ meter measures the average—

Let's talk about that, the average sound level over a period of time.

We did select three-minute intervals to measure that sound level. And we tried to keep that level around 75, 77, 78, around there.

Q. Well, if an LEQ meter gave you a reading of 75,—

A. Yeah.

Q. —does that mean that the noise level was 75 throughout the three-minute period?

A. That means that that sound energy over that two- or three-minute period of measurement can be replaced with a continuous pure tone or some sound that isn't random in nature, having the same sound energy as the random varying (49) signal we were listening to. The peaked levels can well exceed 75 DBA.

Q. And they could also be lower?

A. And they could also be lower than 75 DBA.

It's like taking a group of numbers, 50, 60, 70, 80, 90, and taking the average. There are numbers above that level, and there are numbers below that level.

Q. Was there a maximum decibel level set for the Rock Against Racism concert?

A. At that time, the Police Department—we decided that something between 75 and 78—really, it was around that level—would be more than sufficient for people within the audience to enjoy the concert and for people outside the perimeter of that park not to be disturbed by the sounds.

As we move from the perimeter toward the Band Shell, the sound levels or that LEQ level would increase. If we went half the distance, we would get approximately a four-to-five decibel increase in that sound energy. It would be 80, 85 in the center.

Q. Do you ever measure the LEQ decibel level from directly in front of the stage?

A. No, because first of all, there are problems with that. You want to get at a normally—

All these measurements in the sound field are (50) done at a residential property line, at some perimeter, a certain given distance away from the sound source.

If you move right into a sound source and take measurements, you can have problems with that measurement if you try to extrapolate it, say, to 100 or 200 feet away.

Most of the codes, in fact, a distance is specified from a sound source for that measurement.

Q. Now, you stated that you measured the sound level from the edge of the Band Shell area, approximately?

A. It was approximately—It was a walking path, and we were in front of that walking path. We were about twenty-five to thirty feet in back of the audience. I estimate the distance from the Band Shell was approximately 250 feet, something like that.

Q. So how many decibels above the ambient level did you estimate that the 75 ceiling would be?

A. It was approximately 15 to 17, 18 decibels above the ambient, which is equivalent to a sound source about—better than twice as loud as compared to the existing noise level.

THE COURT: Are you describing what you've just said?

THE WITNESS: Yeah.

THE COURT: Calculation that you were making before any music was playing?

(51) THE WITNESS: We saw that the ambient was 60 decibels.

THE COURT: Yes, you told me that.

THE WITNESS: We then measured—We then said, "Well, we have to increase—have some increase in loudness in the levels which would mask the noise in the park and yet enable the people to hear this sound."

We do know, and it's in all books, that a ten-decibel change in sound pressure is equivalent to increasing the loudness of a signal by twice. We went above that. We went to fifteen decibels.

It just isn't a straight ratio, and we felt a fifteen- or eighteen-decibel increase at the perimeter of that Band Shell would be sufficient for people to enjoy the concert.

Again, as we move in toward that Band Shell, as we approach the noise source, the sound levels, the sound energy, the LEQ level would increase.

THE COURT: So your 75 to 78 calculation was based upon your finding as to the ambient sound level, and your calculation of what in those circumstances should be sufficient for the audience.

THE WITNESS: Yes. In order for the noise level not to be intrusive to the people in the park and also to meet our New York City Noise Control Code at the Central Park (52) West property line, residential property line.

THE COURT: Well, what is the Code's provision in respect of the residential property line?

THE WITNESS: It was residential property line—And I haven't checks this, but Central Park West would be declared as a high density residential land use zone. The LEQ level would be 65 DBA as a daytime standard. That is, between the hours of 7:00 a.m. and 10:00 p.m. That was one of the guidelines we used, or standards.

We also did use another guideline and this is what we call a City Environmental Regulation. It is a guideline where we state that for parks—that we do classify a park as acceptable, marginally acceptable, marginally unacceptable. We require that outdoor areas—

We first measure the ambient. And if the so-called L-10 level for the worst hour, or for ten percent of the time, the noise level is 55 DBA or less, we would state that park is classified that the general noise exposure level for the park as acceptable. That is the ambient.

Central Park, that L-10 is pretty close to that ambient.

In addition, this guideline states that any new activity in the park shall not increase that ambient level by more than 3 DBA in that area. We use this as a guideline.

The levels we used at the Central Park concert (53) are much, much higher than that.

THE COURT: Okay.

MR. VIGNOLA: May I proceed, your Honor?

THE COURT: Yes.

BY MR. VIGNOLA:

Q. At the point at which you were measuring the sound level, what was behind you?

A. Behind us was a walking path at that time; people walking; there were also some radios playing.

Q. Was there anything that would absorb the noise?

A. Well, trees, the earth, there is some absorption factor in the noise. But you could have a hundred-foot thicket of trees that may reduce the noise level maybe a few decibels. It isn't the best absorber of sound going, contrary to what people think.

Q. If I told you that a concert measured an average of about 115, an LEQ of 115, four feet in front of the stage, could you tell what the LEQ would be at the perimeter of, say, the Band Shell?

A. It would be a rough estimation, because your nearest sound source, doubling the distance, if it's a point source—In other words, if the sound source, if the distance is much greater than the sound source, itself you have an attenuation of 60 DBA for doubling the distance.

If you're, say, along—if you're very close (54) to the sound source, there may be 3 DBA.

In order to calculate this, it would be kind of difficult. But if I had to give an estimate, it would be in the 90's, between 85 and 90 at that distance, if we had an LEQ of 115 near the stage.

Another thing, an LEQ of 115 near the stage, I wouldn't want to measure that level in the first place. The peak levels would defi-

nitely approach 110, 115 decibels, 120 decibels. It would be very loud. That is extremely loud as a sound energy level, 115. We're not talking about peak, but sound energy.

Q. Well, what can the peak be under those circumstances?

A. The peak, depending how frequently it occurs, since the average is 115, more than likely, the peak well exceeds 115. It's like the average of any two numbers.

Q. Is there a level at which an LEQ level is considered dangerous?

A. Well, in OSHA standards,—this is for working people—and LEQ level exceeding 85 DBA over an eight-hour period, it's recommended that these levels not be exceeded.

In the long term, if you're subjected to this level for a long period of time,—and don't ask me how long—it can affect your hearing.

If you're in a level of 115, say, 90, 100 decibel (55) LEQ level, the short period of time,—example, a person going to a disco continually—in the long run,—he possibly first will have a threshold shift in his level. In the long run, he may have permanent damage to his hearing.

I don't think we're talking about damage criteria here.

Q. Now, Mr. Schulman, have you ever measured the sound level at any other outdoor events?

A. Well, at the Forest Hills Tennis Club, we did measure the sound levels there at some concert.

Q. What type of concert?

A. This was some sort of group. It was a rock group, or something like that. We did measure the levels in accordance with the New York City Noise Control Code at a residential property line.

Q. And what was the maximum permissible LEQ level there?

A. Well, since there was a low density residential zone, the maximum permissible level after, say, 10:00 p.m. at night would be 50 decibels.

Q. What about before 10:00 p.m.?

A. 60 decibels.

Q. Have you ever measured the LEQ level at any other events?

A. Well, there used to be the Schaeffer Sound—(56) Schaeffer Festivals in Central Park. There were a number of complaints from residents on Central Park West, and we did establish in '76 some measurement procedure in order to control these noise levels.

Q. Were sound measurements actually made?

A. At that time, we didn't have—the department didn't have any LEQ measurements. We used the simple sound level meter. And we watched the meter for thirty seconds, and we said, "Well, the level can't exceed more than 90—more than 80." And then we let a minute go by. And then we said we'd measure another thirty seconds.

It was a very cumbersome way of controlling the noise levels at the Schaeffer concert. But we were able to do it. The techniques available today, it's much simpler to monitor these levels.

Q. Well, more precisely, what were the restrictions placed on the Schaeffer Festival?

A. I have a copy of it. During any one-minute measurement interval, the meter reading shall not exceed 80 DBA for more than thirty seconds.

Q. Now, is that a peak level?

A. Yes, it's a peak level for more than thirty seconds. You'd actually have to watch that level for thirty seconds. It can't exceed 80 DBA. The meter reading shall not—Also, the meter reading shall not exceed 95 DBA (57) at any time. That means at any instant of time, that meter shouldn't be above 95 DBA.

Q. Now, if an LEQ measured a reading of 75 or 80,—

A. Yeah.

Q. —hypothetically, for a thiree-minute period, could the peaks go above?

A. Yes. 80—

Q. Could it go above 95?

A. The LEQ is very dependent upon peak noise levels. In other words, it can go, say, to 80 three or four times during that period. It may—It can only go once possibly to 95, because that peak—the peak level actually determines the sound energy that you're measuring.

Q. Do your determinations on acceptable sound level vary depending on what type of music is played?

A. No, no.

Q. Well, do you know what raggae music is?

A. I have an idea what raggae is.

Q. Well, assuming that music was played that had a greater base element in it, would that music tend to have a higher LEQ level or lower LEQ level or the same?

A. You really can't tell. Base sounds well below—base is in the area around 50, 60, 40 cycles attenuated by this meter. The meter is what you call A weighted. So peak levels are attenuated tremendously by these sounds. Although (58) base sounds are annoying, a lot depends on the level of the base you're playing.

Q. Well, would there be any difference, in your opinion, on the acceptable LEQ level between raggae and, say, rock and roll?

A. We would use our same measure. I would apply the same measurement technique.

Q. Do you know how many people were present at the Rock Against Racism concert last year, approximately?

A. If I had to estimate it, I would say it was only four or five hundred, or possibly less.

Q. Mr. Schulman, why are not decibel levels set for concerts in the park?

A. Well, it's very difficult. Because first of all, you'd have to look at the location and see how close it is to some noise sensitive zone, a hospital or residential development, or how much of the park use is used for other activity, and all that. It would be very difficult to specify for every park and for every concert a given level, without taking into account the conditions associated with the park: the basic background ambient, how much of the park is used for other forms of enjoyment,—may only be used to sit around—how close is the park to a hospital, things like that. It would be difficult to specify a level on this for these parks.

(59) MR. VIGNOLA: May I have one moment, your Honor?

THE COURT: Yes.

MR. VIGNOLA: Thank You.

(Pause)

MR. VIGNOLA: I have no further questions at this time, your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. GOMBINER:

Q. Mr. Schulman, what time did you determine the ambient level for Central Park last year?

A. We got there sometime—most—The park levels were determined well before 11:00 a.m.

Q. Were they determined, say, at 9:00 a.m.?

A. No, we got there after 9:00 a.m.

Q. And do you know how many people were in the park at that time?

A. There were people in the park. I could not tell you how many people were in the park area.

Q. When you determined the ambient level, did you in any way control for the possibility that there might be more people in the park at, say, 2:00 o'clock than at 10:00 o'clock?

A. Well, if you—I'll give you an example how this energy level changed.

(60) If a group of people are talking, and you double the group of people talking at the same level, the ambient level would only increase three decibels. A three-decibel change in energy is a lot. The ambient level at that time, you're correct, will basically determine by the amount of people in the park, the activities, radios, and all that.

But within that bandstand area, there was—there were people walking around, but no one was shouting. There were radios playing. The ambient was between 55 and 60 decibels.

Q. And did you measure this ambient, initial ambient level at the Band Shell?

A. Yes, we can measure the ambient any place.

Q. No. Did you? Where did you measure it?

A. No, we measured it around the perimeter, basically, and other areas of the park, up to Central Park West, and all that, within the park area.

Q. And when you measured ambient level around the perimeter, there wasn't a crowd there listening to a concert, was there?

A. At that time, the nature—the definition of "ambient" is the basic sound energy level in the area without the sound source operating. The concert wasn't on at all.

Q. Well, a crowd gives rise to some noise, too, doesn't it?

(61) A. Ordinary conversation would be about 60, 62, 63 DBA.

Q. What about a crowd of people listening to rock music? Would they give rise to some sound?

A. Yes, they would affect that ambient and all that. They would.

Q. A sound meter can differentiate between the sound of a crowd and the sound coming from amplified instruments?

A. No. All it does is measure the sound energy level in the area, from both near and far sources. It doesn't tell us—the sound meter can't tell you—it's not a tape recording—what the sound sources are. But it's a typical sound energy level in the area.

We could, if we all stayed quiet and we measured—or few of us were talking like now, and we took a measurement of the sound energy in this room, we would get a certain average level over a period of time. If we stopped talking, it would be lower.

The meter in this case won't differentiate, you know, the sound sources.

Q. You have no way, then, of being able to tell what degree of noise on your sound meter came from the crowd and what degree came from the instruments?

A. That really—

MR. VIGNOLA: Objection.

(62) A. —isn't really important. All we do know, that the average sound energy—increase in sound energy that we did allow was 15 decibels. We can't tell whether it was a horn or drum or anything else in the sound source from the concert, either. But it's that average sound energy we're interested in.

Q. All right. Now, you've testified that you determined in conjunction with the Police Department that an average level of 75 on the LEQ would be adequate for everyone to be happy.

A. Yes. I use the term "happy." It would be adequate for both the people in the audience to hear the concert, to hear it clearly, without any outside noise sources masking the concert level. As we approach the Band Shell, the sound energy levels increase. Simultaneously, people outside of that concert area won't be intruded upon or disturbed by these noise sources.

Q. Now, in terms of determining whether people in the audience could enjoy the sound, that's a subjective determination, isn't it?

A. Yes.

Q. I mean, you're familiar with the fact that certain sorts of noises can be heard at higher levels and still be pleasing to certain people's ears, as opposed to other sorts of noises?

(63) A. Yes.

Q. Do you ever ask anyone in the audience whether the sound seemed enjoyable to them?

A. No, sir.

Q. Do you ever ask anyone at the perimeter or outside the perimeter whether they're being disturbed by the noise?

A. Basically, our levels were decided strictly on experience, other literature governing the subject, and all that, what a ten-decibel increase in sound energy means, what a fifteen-decibel increase means, whether this is adequate for people to enjoy something, and also for people not to be disturbed by something. It's really a number that we try to balance.

We didn't take no poll or conduct any poll, as: "Is this too loud for you?" Or "Is this not loud enough for you?"

Q. When you were conducting this experiment, were you inside some vehicle, or were you standing on the road?

A. We were outside.

The microphone was an outdoor microphone. The microphone was mounted outside, outdoors.

Q. Were there other people there with you?

A. Yes.

The microphone, in fact, was about ten, fifteen—(64)ten feet or more above ground level. Any conversation in the immediate area wouldn't really affect that sound energy that amount.

Q. You didn't have any trouble talking to people you were with, did you?

A. No.

Q. Now, you've testified that the sound levels that you recorded were generally somewhere around 80 decibels. Is that correct?

A. The sound level or the sound energy level?

Q. The sound energy level.

A. Between 75 and 80.

Q. And that was at a distance of about 250 feet; is that correct?

A. Yes, approximately.

THE COURT: When did you make those measurements?

THE WITNESS: This was sometime last year in May, the last time this group was in the park.

THE COURT: So did a time come when, after making your ambient sound measurements, as you have described them, you went back and heard the concert actually in performance?

THE WITNESS: Yes, we did listen to it.

THE COURT: All right.

THE WITNESS: I wasn't there the whole time. I was there for a few hours.

(65) THE COURT: I do not think that has been developed in the testimony with sufficient detail. I want to hear about that, Mr. Schulman. Tell me—

Well, counsel can put some questions on the subject.

THE WITNESS: We did use—

Shall I defer?

THE COURT: Yes, just go ahead. Tell me what you did.

THE WITNESS: We did make measurements using—of the sound level using a metrosonics sound level meter. It's a model 306A.

We first measured the ambient level at that perimeter. We then started to measure the sound levels generated by the concert.

By the way, if a sound source increases by ten decibels, is above a ten-decibel level, the ambient level contributes nothing to that sound source, if it's 10 DBA or greater.

We did start to listen to the sound source emanating from the group playing. The levels were—the LEQ levels initially varied 88, 90. They were told to come down. I think we brought it down to the 80's and then into the 70's. We did try—the Police Department did try to control that level.

(66) Q. And you're testifying it did come down?

A. To around 75, 78.

Q. All right. Now, if the sound level was 75 to 78,—

A. The LEQ?

Q. The LEQ. Excuse me.

If that was 75 to 78 at 250 feet, could you tell us what it would be at 500 feet?

A. Pretty closely. Sound—Since it's about 75—Let's take the number 78 at 250 feet. Let's make the assumption a free field. It would be six decibels lower.

Q. And if it's about 72, that's about—

A. —66.

Q. Well, let's say—

A. Doubling the distance from the sound source.

Q. I'm saying if it is 72 at 500 feet, that would be approximately the sound of two people talking to each other?

A. No. I think normal conversation, if you're talking LEQ, is much lower than that. If you're talking peak levels, if I'm talking to you, I would just guess, it would be in the 60's.

There is a big difference between an instantaneous reading on a sound level meter where we're measuring sound pressure and where we're taking an LEQ measurement over a (67) period of time. That's not the same thing.

Our normal conversation, normal conversation between two people, the LEQ would be in the low 50's.

Q. Well, can you give me an example of what 72 would sound like, something else that it would sound like?

A. Okay. If you stayed on, say, Third Avenue, and you listened to the street noise, the average LEQ there would be between 72 and 75 decibels.

Q. So somebody 500 feet from the concert would experience approximately the same level of noise as someone who is standing at Third Avenue.

A. Pretty much so. Again, the important thing is to keep in mind the energy levels, the background levels in the park before the sound source started up.

Q. Do you have any idea what the average sound level in a discoteque is, where music is played?

A. Peak levels or energywise?

Q. Well, let's stick with energy levels.

A. Okay. If you were in the center of a disco, it would be between 90 and a 100 decibels, the sound energy, or possibly louder. It's pretty loud.

Q. Would you say the sound level 500 feet from this concert was pretty loud?

A. No, it isn't pretty loud. But what it did do, it increased you ambient more than ten decibels.

(68) Where a person is sitting in an environment of 60 decibels and suddenly there is a ten-decibel change in the ambient, he experiences something twice as loud. This can be annoying and disturbing.

It's as if you're sitting in your bedroom and suddenly an air conditioner is turned on. That could disturb you.

You're in an environment that's so much. If you get a ten-decibel change, you're going to notice that signal.

Q. Mr. Schulman, what you're really trying to tell us, that you arrived at these standards by taking—

A. I'm not arriving at a standard.

Q. You've testified that you and the Police Department determined that something between 75 and 78 would keep everybody happy. Correct?

A. Yes.

Q. And the way you arrived at that was by saying at 10:00 o'clock in the morning, the ambient is such-and-such, and we'll add on about ten to that. And therefore, anyone who is there at 10:00 in the morning—

A. We're adding more than ten. We're adding fifteen to eighteen. That's a tremendous increase.

Q. I know what you're adding.

A. A ten-decibel change in sound level is a ten-fold (69) change in sound energy, if that's more meaningful to you.

THE COURT: Say that again.

THE WITNESS: A ten-decibel change in LEQ is a ten-fold increase in sound energy. And that's quite an increase.

Again, it's a level that we determined that would be adequate for all concerned people.

THE COURT: You said, didn't you, that a ten-decibel change in LEQ is a ten-fold increase in—

THE WITNESS: In sound energy.

THE COURT: And also twice as, quote, "loud," unquote.

THE WITNESS: Twice as loud.

THE COURT: All right.

THE WITNESS: Again, loudness cannot be measured by any meter.

Q. And similarly, what sound level is annoying or disturbing can't be measured by any—

A. There is no meter—you're right—that will measure the degree of annoyance, the degree of disturbance.

There are a lot of statistics on it. And it would tell you that when sound levels at 70 decibels, a certain percentage of people are disturbed or complain about that noise. When there is a sudden increase five decibels, another percentage of people are increased—are disturbed (70) by it.

Again, there is some subjectivity to it. And this is about the only way you can deal with sound and loudness.

Q. Do you have any idea what the average LEQ level of an orchestra at Carnegie Hall would be?

A. I have no idea. I really don't.

First of all, it would depend upon the location. If I'm up close to the orchestra, it would be one level. As I move away, the sound energy level would decrease.

Q. Now, you've also testified that your determination as to what the appropriate sound level would be would not vary with the type of concert. Is that correct?

A. No, we would use that level whether it would be—if it were a symphony or rock group or raggae group. We would use that number.

Q. And the number you would use is not—Is the number you use, 75 to 78, is that the number you would use?

A. Around that figure.

Q. All right. How many other concerts have you been asked to measure at the Band Shell?

A. Well, I was never at the Band Shell in particular before. I was at the Wollman Rink when the Schaeffer Festivals were held.

At that time, as I stated, we used a different (71) method of measurement, since these meters weren't available, these LEQ meters.

We did measure the concert at the Forest Hills stadium. We had a code to go by there. The New York City Noise Control Code stated the levels that a given activity can emit or which can emanated at a residential property line.

In this case, we're dealing more than with a residential property line. We're dealing with people within a park, and then comes the residential property line.

Q. So in the last nine years, no one has ever asked you to measure the sound level at anything in Central Park; is that correct?

A. We—Well, the previous year, we did the—

Q. Other than the Rock Against Racism.

A. The last time we did some measurements there was in 1976, the Schaeffer Music Festival. At least, I did. I'm not aware—It's very possible that other people in my department did some measurements there. This, I'm not sure of.

Q. At least you were not asked to do anything in the last nine years.

A. No.

Q. When the Diana Ross concert took place, nobody asked you to be there; is that correct?

A. No.

(72) Q. Are you aware of the fact that WNEW holds a concert in Central Park every year?

A. Who?

Q. WNEW. It's a radio station.

A. Yes, I'm familiar with the radio—I'm not aware that they hold a concert every year.

Q. Are you aware that there are operas presented in the park?

A. Yes, I am aware of that. We have had complaints from people from operas, and all that, from people on Central Park West.

But what our department did do is, call the organizers of the concert. A lot of times, we got some voluntary compliance with it.

Q. But nobody ever instructed you to go to the opera and see—

A. No.

Q. —how loud it was.

A. No.

Q. And you don't, in fact, know if the opera is 75 to 78—

A. No.

Q. —or louder or softer.

A. No. At least, I don't know—I would imagine at the perimeter of the audience, the levels would be around (73) that level. I don't think it would be much higher.

Q. It could be somewhat higher, but you don't know.

A. First of all, these—more people attend these concerts. These are in the thousands of people. They extend out more

through the park. It's very possible that 250 feet at the same distance as we measured this group, the levels at an opera may be louder. But at the perimeter of the concert, it may be well within the levels we specified.

In any case, they would have to meet the ambient noise quality zone as they approach that residential property line as that concert moves out. That noise level, that standard, would apply.

Q. Well, what noise measurements did you take at the residential property line for this concert?

A. There was no need to take any measurements at the residential property line.

Q. You don't know, in fact, what the noise levels were.

A. We do know at the residential property line that the sound source was barely audible. We did have a fellow, Nerva Paul, one of our engineers, take a walk there and listen.

Q. And he could barely hear?

A. He could barely hear it.

MR. GOMBINER: No further questions.

MR. VIGNOLA: May I have a few questions, your (74) Honor?

THE COURT: Yes.

I am going to have to rise at 4:30. We will finish with this witness if we can. But if not, we will have to go forward.

Counsel have other witnesses in mind, in any event?

MR VIGNOLA: We don't have any further witnesses, your Honor.

THE COURT: How about the plaintiff?

MR GOMBINER: Your Honor, I think at the conclusion of their testimony, we might want to hear oral argument before we're

required to put on any witnesses. I'm not sure we're going to be obligated to call anyone. But we do have witnesses if the Court determines otherwise.

THE COURT: Well, I will have to rise at 4:30 and then go over until mid-morning or afternoon.

There is a criminal trial and selection of a jury which starts first thing on Monday morning.

But we will go for a few minutes and see where we get.

Go ahead.

REDIRECT EXAMINATION

BY MR. VIGNOLA:

Q. Do you know when Nerva Paul went to measure that (75) sound level?

A. Well, he did measure it while the concert was on.

Which sound level were you talking about, at the residential property line?

Q. At the residential property line.

A. While the concert was on.

Q. Do you know at what point of the concert that was?

A. It was well into the concert. I wouldn't know what point. But he basically listened to it, and—

By the way, he also had a sound level meter with him. When I say it wasn't audible, it wasn't discernible on the sound level meter. There was no change in the sound signal source.

THE COURT: Was this the residential property line?

THE WITNESS: Central Park West.

THE COURT: Central Park West.

Q. If there were a musical concert in Madison Square Garden and you had to go and measure the sound level, what would be an acceptable sound level?

A. Again, we would have to look at a land use zone for Madison Square Garden. We would normally measure at the nearest residential property line and determine if it's a (76) high density, a low density residential area.

Q. Do you know what that level would be?

A. For a high density residential area, it's specified in the Code. After 10:00 p.m., it would be—I think it's 65 DBA. After 10:00 p.m., for a high density, it would be 55 DBA. Before 10:00 p.m., it would be 65 DBA.

Q. Now you don't know whether the 75 to 78 DBA number was communicated to Mr. Tuckerman at the Rock Against Racism concert?

A. If I'm not mistaken, Lieutenant McNulty—

MR. GOMBINER: Objection.

THE COURT: Do you have any personal knowledge of what communication was given?

THE WITNESS: While I was there, these numbers, by the police officers—levels within that range were communicated to Mr. Dean Tuckerman. And I think he relayed that information to the people controlling the sound levels, the amplifiers and all that.

THE COURT: Are you speaking of a time when the ambient levels—This is later?

THE WITNESS: No, this is during the concert, itself.

THE COURT: During the concert, itself. All right.

Q. Now, would an acceptable LEQ level differ, (77) depending on the location in the park at which you were taking the measurement?

A. Well, we could measure the LEQ level half the distance within the bandstand. We could have measured it further away. But when we measure it further away, it would be difficult to obtain a concert level.

In other words, if the LEQ was, say, 65 or 66, and the ambient is 60, we would then have to calculate the concert level, what it would be. When the concert level reaches a point where it's ten decibels or more above the ambient, we can ignore the sound level of the ambient completely in our calculations. It doesn't contribute anything to the sound level.

So this is one of the reasons why we stay away from an area that's quite a bit distance from the sound source in order to measure the sound source right then and there without having the ambient contribute to the level of that sound source.

Q. So then, would an acceptable LEQ number vary, depending upon the ambient level?

A. If the ambience, say was 75 decibels, and the concert level was 75 decibels, the total sound level in the area would be 78 decibels. With that type of ambient, 75-decibel ambient, no one would enjoy it. It would be pretty noisy, and the concert levels would have to go to 85 or 90 (78) at that point before you would really hear it.

Q. Well, now, if you were trying to determine what would be an acceptable LEQ level for a particular event—

A. We would have to, number one, look at the ambient; number two, look at the land use zone in the area; look for any noise sensitive facilities in the area, like a hospital or a school; how large is the area, the open area; what are the activities that area is designed for.

It would really be difficult to specify a level for a concert within a small portion of a park. It would be a difficult thing to do without taking anything else into account.

We can specify the levels at a residential property line or at a hospital property line. That could be done.

Within a park area, a lot of judgment has to come into this.

MR. VIGNOLA: I have no further questions, your Honor.

THE COURT: All right. Mr. Schulman, I think your testimony is concluded. Thank you very much.

(Witness excused)

• • •

Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
Order Appealed from and Decision of Haight, J., entered May 2, 1986

REPRODUCED, *SUPRA*, ON PP. JA 78—JA 83

Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

-against-

NOTICE OF APPEAL

85 Civ. 3000 (CSH)

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, et al.

Defendants.

NOTICE IS HEREBY GIVEN that the defendants appeal to the United States Court for the Second Circuit from the Order of United States District Judge Charles S. Haight, entered May 2, 1986, which on first amendment grounds preliminarily enjoined the City of New York Department of Parks and Recreation from enforcing regulations governing use of a Bandshell facility in Central Park.

Dated: New York, New York
May 16, 1986

United States Court of Appeals for the Second Circuit:
Notice of Appeal

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Assistant Corporation
Counsel

TO: CLERK OF THE COURT
United States District Court
Southern District of New York

PETER AVENIA
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Attorney for Plaintiff
177 Prince Street
New York, N.Y. 10012

Notice of Motion to Alter or Amend Judgment, entered April 23, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

-against-

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York, *et al.*

Defendants.

NOTICE OF MOTION TO ALTER OR AMEND JUDGMENT

85 Civ. 3000 (CSH)

PLEASE TAKE NOTICE that, upon the declaration of Jonathan Pines and accompanying memorandum of law, both dated April 20, 1987, and upon all prior pleadings and proceedings had herein, the undersigned will move this Court, before the Honorable Charles S. Haight, United States District Judge for the Southern District of New York, at the United States Courthouse, Foley Square, New York, New York, on April 29, 1987, on submission, for an order, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, altering or amending the order and judgment of this Court entered April 16, 1987 in the above-captioned action, insofar as such order would permanently enjoin defendants from enforcing a provision in the Use Guidelines for the Naumburg Bandshell that prohibited solicitation for funds in Central Park, and granting such other and further relief as the Court deems just and proper.

Notice of Motion to Alter or Amend Judgment, Entered April 23, 1987

Dated: New York, New York
April 20, 1987

Respectfully submitted,

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By: s/Jonathan Pines
JONATHAN PINES

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Declaration of Jonathan Pines Read in Support of the Motion to Alter or Amend Judgment, Entered April 23, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

-against-

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York, *et al.*,

Defendants.

DECLARATION OF JONATHAN PINES IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT

85 Civ. 3000 (CSH)

JONATHAN PINES declares, under penalty of perjury, that the following is true and correct:

1. I am an Assistant Corporation Counsel in the office of Peter L. Zimroth, Corporation Counsel of the City of New York, counsel for defendants in this action. I am fully familiar with the facts and circumstances of this action, and submit this declaration in support of defendants' motion, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend the Court's order in this action, entered April 16, 1987.

2. Specifically, defendants seek an order altering or amending so much of the Court's April 16th order as enjoins the New York City Department of Parks and Recreation ("Parks Department") from enforcing a prohibition against solicitation for funds and revenue in Central Park. Defendants seek this relief on the ground that a challenge to the anti-solicitation provision was neither set forth in the pleadings, nor clearly identified in plaintiff's pretrial submissions, nor included among the claims specifically designated by the Court as those which it would adjudicate.

3. In this action, the plaintiff organization, Rock Against Racism ("RAR"), challenged specific provisions of a set of regu-

lations, entitled the "Use Guidelines for the Naumburg Bandshell," promulgated by the Parks Department to govern the use of the Naumburg Bandshell ("the Bandshell") in Central Park. Plaintiff claimed that the challenged provisions violated rights secured to it by the First Amendment.

4. RAR filed an Amended Complaint on November 5, 1986, which superseded a prior complaint filed on April 18, 1985. In the Amended Complaint, RAR challenged the following provisions of the Use Guidelines:

> (a) the regulation governing the permissible duration of performances at the Bandshell (Amended Complaint, ¶ 25 (a));
>
> (b) the regulation requiring use of the Parks Department's sound system provider (*id.*, ¶ 25 (b));
>
> (c) the regulation requiring payment of an application fee and a user's fee for the Parks Department's sound system (*id.*, ¶ 25 (c));
>
> (d) the regulation limiting the number of attendees at Bandshell events (*id.*,¶ 25 (d);
>
> (e) the regulation prohibiting the distribution of designated printed materials [rescinded] (*id.*,¶ 25 (e));
>
> (f) the standards by which the Parks Department measured compliance with the Use Guidelines' provisions (*id.*,¶ 25 (f)); and
>
> (g) the regulations requiring "insurance bonds, and other bonds" (*id.*,¶ 25 (g)).

A copy of the Amended Complaint is annexed as Exhibit "A."

5. The parties submitted pretrial papers, including proposed findings of fact and conclusions of law. While plaintiff's proposed findings of fact referred to a prohibition against solicitation of funds in the Use Guidelines (Plaintiff's Proposed Findings of Fact at ¶ 17(i), p. 5), and to the Department's designation of rain dates (neither of which was included in the Amended Complaint), plaintiff's conclusions of law were entirely silent as to the anti-solicitation provision. Plaintiff's Proposed Findings of Fact and Conclusions of Law are annexed cumulatively as Exhibit "B."

6. The Court heard testimony over a period of seven days, from March 23 through April 1, 1987. At the conclusion of the second day trial, the Court, noting the latitude it had given plaintiff's counsel's inquiry to that point, held that the "boundaries of this proceeding" would be determined by the conclusions of law and the pleadings previously submitted. Specifically, the Court indicated the following:

> [T]he purpose of the conclusions of law is to identify in advance particularly what regulations the plaintiffs complain of and why they complain of them, and according to the conclusions of law, which together with the pleadings I am going to take as framing the boundaries of these proceedings, the particular regulations that are complained of are these:
>
> (a) Regulations which bar the distribution, portraying, displaying, et cetera, of handbills and fliers.
>
> (b) The special events permit fee is challenged.
>
> (c) The regulations requiring the Department of Parks to provide its own sound system is challenged.
>
> (d) The regulation listing the hours of performance from two hours to six hours is challenged.
>
> And lastly, in paragraph 6 of the proposed conclusions of law it says, "Charging organizers of political events a fee, whether a direct entrance fee or an indirect insurance requirement for assembly" is challenged.

> I don't know if plaintiffs are attacking in different words the insurance fee or are also attacking the clean[-up] bond, as to which I have heard a considerable amount of testimony but does not appear to be specifically attacked in the conclusions of the law. But I am going to hold plaintiffs in their examination and cross-examination to the particular challenges made to these regulations which are set forth in the conclusions of law. That is the purpose of these pretrial papers, and I am going to enforce them.

Trial transcript at 271-273. A copy of these pages of the trial transcript are annexed as Exhibit "C."

7. Thus, the Court, in "framing the boundaries of these proceedings," did not include any challenge to the anti-solicitation provision contained in the Use Guidelines. Significantly, plaintiff's counsel did not protest in any manner the Court's determination of the scope of trial. In the circumstances, plaintiff's acquiescence should reasonably be deemed to manifest assent.

8. There was some limited testimony regarding one isolated incident involving a vendor of food during the 1986 RAR event at the Bandshell. However, in response to the Court's question regarding the relevance of the testimony, I expressly indicated that the testimony was relevant for the limited purposes of evidencing defendants' state of mind and of showing defendants' good faith in dealing with participants at last year's event. The testimony was elicited to show that, while Department officials could have confiscated the vendor's goods and issued a summons for a Health Code (not a Use Guidelines) violation, they permitted the vendor to continue to distribute goods so long as no money changed hands (Tr. 323). A copy of this portion of the trial transcript is annexed as Exhibit "D."

9. This Court, in striking down the anti-solicitation provision in the Use Guidelines, held that "[t]he City failed to identify any legitimate interest underlying this prohibition on solicitation"

(Mem. op. at 28). However, defendants lacked notice that they were obliged to present evidence in defense of this provision. Indeed, defendants had ample notice to the contrary, in the pleadings, the pretrial papers, and the Court's specific instruction. A copy of the Court's Memorandum Opinion and Order is annexed as Exhibit "E."

10. Given that the burden of notice pleading is appropriately placed on the plaintiff, it is only fair that plaintiff, and not defendants, bear the consequences of its failure to provide adequate notice of the issues to be tried.

11. As a consequence, defendants respectfully request that the Court withdraw in its entirety section "G" of the memorandum decision of April 16, 1987, entitled "Revenue" and addressed to the anti-solicitation provision, and similarly alter and amend its order of that date to delete sub-paragraph 2(e) from the permanent injunction which would restrain defendants and their agents, employees, etc., from enforcing the solicitation prohibition contained in the Use Guidelines.

WHEREFORE, defendants respectfully request that this Court grant their motion to alter or amend the judgment in this action, together with such other relief as the Court deems appropriate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 20, 1987.

s/ Jonathan Pines
JONATHAN PINES

Exhibit A Annexed to the Declaration of Jonathan Pines
Amended Complaint

REPRODUCED *SUPRA*, ON PP. JA 84—JA 90

Exhibit B Annexed to the Declaration of Jonathan Pines
Proposed Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

–against–

HON. BENJAMIN R. WARD, *et al.*,

PROPOSED FINDINGS OF FACT

1. Rock Against Racism is an unincorporated organization which produced a yearly musical/political event in Central Park every year since 1979 on the first weekend in May. Central Park is and has been for many years a forum for First Amendment protected activities.

2. Rock Against Racism is dedicated to providing the highest quality sound at the lowest possible cost for political organizations of similar ideology. Rock Against Racism (Hereafter RAR) is an organization which is dedicated to the espousal and promotion of anti-racist views.

3. RAR has provided sound for hundreds of events nationwide.

4. The RAR May Concert, generally held on the first weekend in May, has been attended by approximately 2,000-4,000 people from 1979 to 1986.

5. In 1981, the RAR permit application was arbitrarily denied

and after a lawsuit was brought, in Federal Court, the event was held in Central Park.

6. In 1984 RAR was unable to secure legal representation and was forced to "agree" to an arbitrary decibel limit in order to gain access to Central Park. Said decibel limit was far too low to allow good quality sound.

7. In 1985 the RAR permit application was denied.

8. The Park Department told applicants, including RAR, in 1985 and 1986, that the Great Lawn and Sheep Meadow were absolutely unavailable for political events. No valid law or order exists to justify this policy.

9. In 1985 Rock Against Racism put in a special event application for the Naumberg Bandshell in Central Park.

10. The City of New York, through the Parks Department turned down RAR's application for their event in Central Park, and offered substitute sites.

11. These substitute sites were not in Manhattan and in no way were equivalent to any site in Central PArk.

12. Because of the City's refusal to grant access to Central Park in 1985, RAR was required to go to the United States District Court for the Southern District of New York, and move that the court grant an injunction to prevent the City

12. (cont.) from interfering in the production and requiring the City to grant the Special events for the annual May event.

13. On May 2, 1985 a stipulation of partial settlement was entered

into by the parties to the litigation which granted RAR the right to produce their annual event in Central Park with specific conditions. As a further result of the partial settlement, the City agreed to review its permit process and agreed to establish new guidelines and regulations concerning the Naumberg Bandshell.

14. On March 21, 1986 the new guidelines for the Bandshell were promulgated by the Commissioner of the Department of Parks, Henry J. Stern, and his associates.

15. In 1986, the permit application was effectively denied by these new "regulations."

16. These guidelines were created by Stern and Killian, the new Program Director for the Naumberg Bandshell, on January 26, 1986.

17. These regulations impermissibly regulate the following:

a. *Permit fees.* The regulations create a vague and unclear sliding scale between $50.00 and $100.00 for special events permits, which bears no relation to the cost of actually processing the fee.

b. *Sound amplification.* The regualtions require the Depart-

b. (cont.) ment of Parks to be the sole and only provider of sound amplification of events. The regulations also give sole discretion to the City's sound amplification system to determine the volume and quality of sound amplification.

c. *User fees.* The regulations require a "user fee" of $100.00 per performance hour with a chargeable one hour sound check.

d. *Hours of events.* The regulation are completely vague and arbitrary as to how and why the hours of use vary form one event to another, with a maximum time of six hours provided for any event. The regulations require all performances to take place between 12:00 p.m. and 6 P.M. The regulations in an arbitrary and vague manner regulate the performance of evening events.

e. *Rain Dates.* The regulations leave total discretion for rain dates in the hands of the Department of Parks.

f. *Number of participants.* The regulations limit the maximum numbers of people for each event to 3,000. The regulations give unlimited discretion to the Bandshell Program Director to choose an alternate site if he/she anticipates more than 3,000 people at an event. The number 3,000 is an arbitrary number and is not reasonably related to time, place or manner restrictions.

g. *Insurance.* The regulations give complete discretion to the Department of Parks to determine the necessity of liability insurance and the amount of liability insurance. The regulations apply only to groupsexercising First amendment assembly rights, and not to individuals who exercise their First amendment rights.

h. *Literature.* The regulations ban the distribution, display or affixing of handbills, flyers, posters, flags or banners.

i. *Solicitation.* The regulations ban the solicitation of funds.

j. The regulations regulate the use of vehicles in that vehicles are allowed only one hour to unload or pack up. This regulation infringes on RAR's ability to adequately set up or break down equipment.

17. These regulations were promulgated in order to give the City wide latitude in censoring First Amendment activity.

18. The Parks department has not consistently enforced the insurance requirement in a consistent manner.

19. In 1986 the RAR permit application was denied under these new"regulations" because of the prhibition on using any sound organization other than one selected by the City for events in Central Park.

20. On February 26, 1986, Christy Robb of RAR was contacted

by Joseph Killian and informed that he was the new program director of the Naumberg Bandshell, and that he had written the new regulations.

21. On April 1, 1986, Christy Robb for the first time received a copy of the new regulations.

22. In April 1986, RAR brought a motion for a temporary restraining order that the new regulation not be enforced because they impermissibly infringed on First Amendment protected activity.

23. On April 26, 1986, a hearing was held in front of the Hon. Charles S. Haight of the Southern District of New York, on the issue of whther a preliminary injunction would be issued.

24. During the hearing on April 26, 1986, testimony was taken from Robert Russo, Assistant Parks Commissioner for City wide Services, City of New York, and Milton Schulman,a physicist for the Department of Environmental Protection, City of New York.

25. Robert Russo testified that:

a. Noise regulations apply to all events in Central Park.

b. Each event is evaluated separately based upon its size, or the music or the expected conflicts with other areas or events in the park.

c. The RAR concert of 1985 was unique in that the Department of Parks measured the level of the noise with the sound meters.

d. No people complained of excessive noise at the 1985 RAR concert.

e. The reason that RAR was refused the Naunberg bandshell was in Mr. Russo's words, because it was a dishonorable organization in that they paid the clean-up bond with dollar

bills, and have played too loudly and engaged in slam dancing in prior years.

26. At the April 1986 hearing, Milton Schulman stated that sound testing at the 1985 RAR concert was not conducted within the Rules and Regulations of the New York City sound ordinance.

27. In both 1985, and 1986, the plaintiffs were forced to spend much of their time in the weeks prior to the May event preparing for litigation. This time would otherwise have been spent promoting the event. Because plaintiffs financial resources are limited, they were unable to compensate for these lost hours, and therefore far fewer people were made aware of the event, and fewer attended.

28. Because of the procedural roadblocks the City and its employees placed in the way of plaintiff's access to Central park, and the uncertainty as to whether a permit would be granted, the plaintiff's members have suffered much frustration, stress, and emotional trauma.

Dated: New York, New York
March 20, 1987

s/ Noah Kinigstein

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s/ James Fosbinder

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NITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff

–against–

BENJAMIN R. WARD, *et al.*,
Defendants.

85 Civ. 3000 (CSH)

PLAINTIFF'S CONCLUSIONS OF LAW

1. RAR has standing to bring this suit for declaratory judgment challenging the Naumberg Bandshell regulations. *Brockett* v. *Spokane Arcades Inc.* 472 US , 86 L Ed 2d 394, 105 S Ct. 2794 (1985); *Broadwick* v. *Oklahoma* 413 US 601, 37 L Ed 2d 830, 93 S Ct. 2908 (1973); *Grayned* v. *City of Rockford*, 408 US 104 33 L Ed 2d 222, 92 S Ct. 2294 (1972); *Bigelow* v. *Virginia* 421 US 809, 44 L Ed 2d 600, 95 S Ct. 2222 (1975).

2 & 3 Central Park is a quintissential public forum for the exercise of First Amendment rights. *Hague* v. *CIO*, 307 US 496, 83 L Ed 1423. 59 S Ct 954 (1939); *PerryEducational Association* v. *Perry Local Educational Association*, 460 US 37, 74 L Ed 2d 794 S Ct (1983), McGreary v. Stone 575 F Supp. 1112 (S.D.N.Y. 1983). The Bandshell regulations are unconstitutional because they are not contentneutral, do not serve an important governmental interest and are not narrowly drawn. *Perry*, supra, *Regan* v. *Time*, 486 US 641, 82 L Ed 2d 487, 104 S Ct 3262 (1984), *U.S.* v. *Grace*, *461* US 171

75 L Ed 2nd 736, 103 S Ct 1702 (1983), *U.S.* v. *O'Brian*, 391 U.S. 367, 20 L Ed 2nd 672, 88 S Ct 1673 (1968).

4. These regulations established a prior restraint on the right of free speech and are unconstitutional as written because

they do not have narrow, objective and definite standards to guide the licensing authority. *Shuttles worth* v. *Birmingham*, 394 US 147 22 L Ed 2nd 162, 89 S CT 935 (1969), *Saia* v. *NY* 334 US 558, 92 L Ed 1574, 68 S. CT 1148 (1948), *Heffron* v. *International Society for Krishna Consiousness, Inc*, 452 US 640, 69 L Ed 2nd, 298, 101 S CT (1981), *Hague, supra.*

5. The individual regulations violate the First amendment in the following manner.

a. Regulations which absolutely bar the distribution, protraying, displaying, the affixing, of handbills, flyers, posters, flags or banners are pre se unconstitutional. *Lovell* v. *Griffin*, 303 US 444, 82 L ed 949, 58 S Ct 666 (1937) Hague, supra, *Schneider* v. *Irvington*, 308 US 147, 84 L Ed 155, 60 S ct 146 (1939), *US* v. *Grace*, 461 US 171 75 LEd 2nd 736, 103 S CT 1702 (1983), *Members of City Council the City of Los Angelos* v. *Taxpayers for Vincent*, 466 US 789, 80 LEd 2nd 772 (1984),

b) the special events permit fee is void for overbreath because

1. It has a arbitrary discretionary scale with no standards. *Shuttles worth*, supra, *Saia*, supra, *Krishna Society*, supra, *Hague*, supra,

2. It deprives indigents persons, unable to pay the filing fee, the equal protection quaranteed by the Fourteenth Amendment. *Bullock* v. *Carter* 405 US 134, 31 L Ed 2nd 92; 92 S CT 849 (1972). *Lubin* v. *Panish*, 415 US 709 39 L ED 702, 94 S CT 1315 (1974), *Lindsey* v. *Normet*, 405 US 56, 31 L ED en 2d 36 , 92 S CT 862 (1972), *Boddie* v. *Connecticut* 401 US 371, 28 L ED 2d 113, 91 S Ct 780 (1971).

c)1. Since music and sound are forms of expression protected by the first amendment RAR should not be denied use of its own sound system. The regulation requiring the Department of Parks to provide it's own sound system is void for overbreadth. This effectively denies RAR control of the music sound, volume, quality and dynamics. *Saia*, supra, *Consolidated Edison Co of NY* v.

Public Service Commission of NY 447 US 530, 65 L ed 319, 100 S Ct (1980) *Cinevision Corp* v. *City of Burbank* 745 F 2d 560 (9th Cir 1984) cert. denied 85 L Ed 2d 480, 105 S Ct 2115.

c) 2) Said regulation is a proscribed limitation on free speech. *Fernandes* v. *Limmer*, 663 F. 2d 619 (8th Cir 1981) reh denied, 669 F.2d 729 cert. den. 458 US 1124.

3) Even if this regulation was held not to deny RAR is constitutional right to its own sound system this regulation would be valid for overbreath for its requiring a "users fee" and hourly chargeable fee. *Murdock* v. *Pennsylvania*, 319 US 105, 87 L ED 1293 S Ct (1942), *Hull* v. *Petrillo*, 439 F 2d 1184 (2nd cir 1971), *Eastern Conn. Citizens Action Group* v. *Powers*, 732 F 2d 1050 (2nd cir 1983).

1) The regulation limiting the hours of performance from two hours to six hours is invalid because it leaves to the Department of Parks, with no standards, the discretion to set the time limits, and arbitrarily limits the total hours. *Saia, supra, Shuttleworth, supra, Reeves* v. *McConn*, 631 F 2d 337 (5th Cir 1980).

2) The regulation requiring all performance to take place between noon and six p.m. is void for overbreath. *Acorn* v. *City of Frontenal* 714 F 2d 813 (8th Cir 1983), *Beckerman* v. *City of Tupelo, Mississippi* 664 F 2d 502 (5th Cir 1981).

3) The banning of all evening programs except when the Department of Parks permits otherwise is an invalid time, place and manner regulation. *Shuttles worth, supra, US* v. *Abney*, 534 F 2d 984 (D.C. Cir 1974), *People* v. *Dominck*, 326 NYS 2nd 466 (1971).

e) The regulations impermissibly regulate the total maximum number of people and give the Program Director the discretion to ban the event if he/she feels the crowd will exceed 3,000. *A Quaker Action Group* v. *Morton*, 516 F 2d 717 (D.C. Cir 1975), *Hefron*, Supra.

f) The Department of Parks has total control to set the amount, if any, of liability insurance, this is an impermissible dis-

cretion and void for for overbreath., *Shuttles worth*, supra, *Saia*, supra, *Heffrom*, supra, *Hague*, supra,

Collin v. *Smith*, 447 F. Supp 676, aff'd 578 F 2d 1197, cert denied 439 US 916, 58 L ED 2d 264, 99 S Ct 291 (1978), *Eastern Conn.* supra.

6. Charging organizers of political events a fee (whether a direct "entrance fee" or an indirect "insurance requirement") for "assembly" (within the meaning of the First amendment) when no fee is required for individuals who engage in precisely the same activity discriminates against those who choose to exercise their free speech right collectively (assemble) rather than individually. *DeJonge* v. *Oregon*, (1937) 299 US 353, 81 L ed 278 57 S Ct 255.

7. Presumed damages for the violation of the plaintiff's First Amendment rights should be awarded, independent of the damages awarded to the plaintiff's in compensation for the injuries they have suffered. *Herrea* v. *Valentine*, 653 F.2d 1222 (8th Cir 1983).

8. The plaintiff's should receive compensatory damages for all time and wages lost as a result of futile efforts to secure their First Amendment rights, and for all emotional trauma that they have suffered as a result of deprivation of these rights by the defendant. *Carey* v. *Pipkus*, 435 U.S. 247 264 (1978).

9. Because the defendant municipal officers have displayed callous indifference to the rights of the plaintiff's and other citizens seeking access to Central Park, a quintessential public forum, and have intentionally denied the plaintiff's access to that forum, punitive damges should be awarded. Punitive damages are also necessary to deter these officials from displaying such callous indifference to the First Amendment rights of citizens in the future. *Haile* v. *Village of Sag Harbor*, 639 F. Supp 718 (E.D. NY 1986) *Smith* v. *Wade*, 461 U.S. 30, 103 S. Ct. 1625 7 S L.Ed. 632 (1983).

Dated: New York, New York
March 20, 1987

s/ Noah A. Kinigstein

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Exhibit C Annexed to the Declaration of Jonathan Pines
Trial Transcript Pages 271-273

Horowitz—direct

(271)* * *not possible to give to the court the Naumburg Bandshell regulations presently in force. What the present evidence consists of is use guidelines for the Naumburg Bandshell in Central Park dated March 21, 1986. If there is a subsequent written version, altered in any way, obviously that should be brought to court first thing tomorrow morning. True?

MR. PINES: Yes. Your Honor, there will be no problem. We were awaiting our case in chief to put in that exhibit and we will undertake to bring it to court. I was planning to bring it in with Joseph Killian's testimony, and unfortunately, because he is out of town, I am not sure. But I will make every effort to get to his office and obtain that, the current use guidelines. I appreciate the court's need to have those regulations.

THE COURT: I think that would be very useful. If there is any question about authenticity, then I suppose their formal receipt into evidence may have to await the testimony of a witness who can qualify them. But we will see where we go on that.

Now, as far as the scope of plaintiff's inquiry is concerned, I have given counsel some latitude, I think, but the purpose of the conclusions of law is to identify in advance particularly what regulations the plaintiffs complain of and why they complain of them, and according to (272) the conclusions of law, which together with the pleadings I am going to take as framing the boundaries of these proceedings, the particular regulations that are complained of are these:

(a) Regulations which bar the distribution, portraying, displaying, et cetera, of handbills and fliers.

(b) The special events permit fee is challenged.

Exhibit C Annexed to the Declaration of Jonathan Pines
Horowitz—direct

(c) The regulation requiring the Department of Parks to provide its own sound system is challenged.

(d) The regulation listing the hours of performance from two hours to six is challenged.

Next, the requirement in respect of liability insurance is challenged.

And lastly, in paragraph 6 of the proposed conclusions of law it says "Charging organizers of political events a fee, whether a direct entrance fee or an indirect insurance requirement for assembly, is challenged.

I don't know if plaintiffs are attacking in different words the insurance fee or are also attacking the cleaning bond, as to which I have heard a considerable amount of testimony but does not appear to be specifically attacked in the conclusions of law.

But I am going to hold plaintiffs in their examination and cross-examination to the particular challenges made to these regulations which are set forth in (273) the conclusions of law. That is the purpose of these pretrial papers and I am going to enforce them.

So with those words of caution, warning, encouragement, I will adjourn these proceedings until tomorrow morning.

MR. PINES: Your Honor, if I may be heard for one moment.

THE COURT: Yes.

MR. PINES: We have not yet resolved the matter of the commissioner's appearance. The plaintiffs had suggested that we stipulate to the commissioner's lack of personal involvement in the regulations. I am prepared to offer on the record what our position is with respect to that, and I would very earnestly hope that we can resolve that now, so that if the commissioner has to be alerted to appear, he can make the appropriate shift in his sched-

ule, his very busy time in the Parks Department, to appear here. He is certainly willing to do so, but our position is it should not be necessary.

THE COURT: Then I will ask the plaintiffs to give me an offer of proof as to what they intend or hope to elicit from Commissioner Stern. What is the answer to that?

MR. PINES: And Kate Pearson as well.

THE COURT: One at a time. Let's start off with Commissioner Stern.

Exhibit D Annexed To The Declaration of Jonathan Pines
Trial Transcript Page 323

Dalton—direct

A. Yes.

Q. Do those laws permit you to close down vendors of food in the park?

A. Yes, to confiscate and summons.

Q. Could you have in fact confiscated and issued a summons to the person who was selling the food?

THE COURT: Is this really a part of this case, Mr. Pines?

MR. PINES: Yes, your Honor, I believe that it is. To the extent that the plaintiffs have suggested that there is some animus specifically directed toward RAR, I believe it is very much probative of the lengths to which the Parks Department has in fact—

THE COURT: All right. Save the argument. Put the question.

Q. Could you in fact have issued a summons and confiscated the food?

A. Yes, we could have.

Q. But you did not?

A. We didn't, no.

Q. Do you have any opinion about RAR personally?

A. Another event.

Q. It has no special significance to you?

A. No, none at all.

Q. Are you offended by their music?

Exhibit E Annexed To The Declaration of Jonathan Pines
Memorandum Opinion and Order of Haight, J.,
entered on April 20, 1987

Reproduced in the Appendix to Petition for a Writ of Certiorari at p.23

Order of Permanent Injunction and Judgment,
Entered April 26, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

- against -

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York;

GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks;

SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks;

ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation;

JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation;

MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and

THE CITY OF NEW YORK,
Defendants.

85 Civ. 3000-(CSH)

ORDER OF PERMANENT INJUNCTION AND JUDGMENT

This case having come on for trial before the Court sitting without a jury; and the Court having entered concurrently herewith its Findings of Fact and Conclusions of Law; it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. This Court's Order dated May 1, 1986 is vacated and superseded by this Order.

2. The defendants, their officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby PERMANENTLY ENJOINED from enforcing against plaintiff Rock Against Racism the following provisions of those certain "Use Guidelines for the Naumberg Bandshell in Central Park" promulgated by the City of New York Parks and Recreation Department, under date of March 21, 1986:

(a) The user fee for the Bandshell sound amplification system.

(b) Those provisions of the Guidelines governing hours of use; provided, however, that defendants may enforce those provisions permitting sound amplification only after 12:00 P.M., and requiring events to be finished by 9:30 P.M.

(c) That provision limiting attendance at the Bandshell and its adjacent concert ground to a maximum of 3,000 people at any event.

(d) That provision calling for the furnishing of insurance.

(e) That provision prohibiting the solicitation for funds and revenue.

3. Except as specifically provided in the foregoing paragraph of this Order, plaintiff's motion for a permanent injunction and complaint for declaratory judgment are denied.

4. Plaintiff's claims for compensatory and punitive damages are denied.

The foregoing constitutes the final Order and Judgment of this Court.

Date: New York, New York
April 16, 1987

s/ Charles S. Haight, Jr.
Charles S. Haight, Jr.
U.S.D.J.

Affirmation of Noah A Kinigstein Read in Opposition to Defendants' Motion to Alter or Amend Judgment, Entered April 29, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York, *et. al.*

Defendants.

AFFIRMATION IN OPPOSITION TO DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT.

85 Civ. 3000 (CSH)

I, NOAH A. KINIGSTEIN, being an attorney duly licensed to practice law in the State of New York and in the United States District Court for the Southern District of New York affirm the following under penalties of perjury:

1. I am the attorney for the above named plaintiff and as such I am fully familiar with the facts and circumstances of this case.

2. I am submitting this affirmation in opposition to the defendants' motion to alter or amend the judgment rendered by this Court on April 16, 1987.

3. The defendants' have moved this Court to alter or amend its judgment as to its finding that the solicitation regulation of the Naumberg Bandshell regulations is facially unconstitutional under the First Amendment. The defendants base their motion on the fact that they did not have notice of plaintiff's challenge to said statute and therefore were put at an unfair disadvantage.

4. Upon information and belief, although the issue of the unconstitutionality of the solicitation statute was not directly

raised in plaintiff's amended complaint, nevertheless there is language in the complaint which challenges the constitutionality of all the Naumberg Bandshell regulations (see Defendants Exhibit A, paragraph 28).

5. In addition, plaintiff did raise the issue of the constitutionality of the solicitation statute in its pre-trial Findings of Fact (See Defendant's Exhibit B, paragraph 17 (i)).

6. It is plaintiff's position that defendants were on adequate notice that all of the regulations were being challenged. In addition, Alan Thompson testified that the plaintiff needed to solicite for funds in order to defray the costs of the concert, and that there ability to put on the annual concert was, to a great extent, dependent upon the ability to solicite at the concert.

7. Upon information and belief, the issue of the constitutionality of the solicitation regulation was made part and parcel of the trial proceedings. There was extensive testimony and cross-examination on the issue of solicitation.

8. Upon information and belief, this Court has the power and the authority to construe the pleadings to do substantial justice. Upon information and belief, substantial justice in this case includes the Court's analysis and determination of the solicitation statute as part of the Court's decision.

WHEREFORE, Plaintiff respectfully requests that defendant's motion to amend or alter the judgment be denied.

Dated New York, New York
April 28, 1987

s/ Noah A. Kinigstein
NOAH A. KINIGSTEIN

Notice of Cross-Motion to Alter or Amend Judgment, Entered April 29, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York, *et. al.*

Defendant.

NOTICE OF CROSS-MOTION TO ALTER OR AMEND JUDGMENT.

85 Civ. 3000 (CSH)

PLEASE TAKE NOTICE, that upon the affirmation of NOAH A. KINIGSTEIN, ESQ., dated April 27, 1987, and upon all prior pleadings and proceedings had herein, the undersigned will cross-move this Court, before the Honorable Charles S. Haight, United States District Judge for the Southern District of New York at the United States Courthouse, Foley Square, New York, New York, on April 19, 1987, on submission for an order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, altering, amending or clarifying the order and judgment of this Court entered April 16, 1987, in the above captioned action, insofar as such order is unclear as between the Memorandum Opinion and Order and the Order of Permanent Injunction and Judgment as to whether the Plaintiff Rock Against Racism is allowed to actually control the mixing board and sound system which is to be provided by the Defendants' leased sound system, New York Sound, and granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 27, 1987

Respectfully Submitted,

s/ Noah A. Kinigstein

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TO: PETER L. ZIMROTH
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By: Jonathon Pines Esq.

Affirmation of Noah A Kinigstein Read in Support of the Cross-Motion to Alter or Amend Judgment, Entered April 29, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

AFFIRMATION

- against -

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York, *et. al.*

85 Civ. 3000 (CSH)

Defendants.

I, NOAH A. KINIGSTEIN, being an attorney duly licensed to practise law in the State of New York and in the United States District Court for the Southern District of New York affirms the following under penalties of perjury:

1) I am the attorney for the plaintiff in the above captioned case and as such I am fully familiar with the facts and circumstances of this action.

2) I am submitting this affirmation in support of plaintiff's cross-motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter, amend or clarify the Court's Order in this action entered on April 16, 1987.

3) Specifically, plaintiff has brought on this cross-motion to alter, amend or clarify the Court's Order for two reasons:

a) It appears that there is an inconsistency between the Court's Memorandum Opinion and Order (See Exhibit A) and the Court's Order of Permanent Injunction (See Exhibit B), both dated April 16, 1987, as to whether the plaintiff has the right to control the sound system "mix" at their annual concert, now scheduled for may 3, 1987 at the Naumburg Bandshell, Central Park;

b) It has become clear in the past several days, in preparation for the May 3, 1987 concert that the defendants have interpreted the Order of Permanent Injunction and Judgment to allow the City's leased sound system to control the mixing board at the may 3, 1987 concert.

4) On April 24, 1987, I spoke with Jim Fossbinder, co-counsel in this case, who informed me that in meetings between the plaintiff and the defendants, in preparation for the May 3, 1987 concert, the defendants interpreted the Court's Order as to deny plaintiff the right to control the mix at the concert.

5) I immediately called Jonathan Pines, the defendants' attorney and asked for clarification of the City's position. I was informed by Mr. Pines that it was the defendants' position that RAR would not be allowed to actually manipulate the sound system mixing board, that is that RAR's sound technician would not be allowed to physically set the sound mix. I was further informed that the New York Sound system would be used. I was finally informed that an RAR representative would be allowed to stand by the mixing board and give verbal instructions to the New York Sound technician.

6. I informed Mr. Pines that my reading of the Court's Order was contrary to his and requested the plaintiff be allowed to control the sound board. I was informed that that would not be possible. I then informed Mr. Pines that plaintiff's would have to bring on a motion to clarify the decision as to this important matter. Mr. Pines agreed to this expedited cross-motion because of the time constraints of the RAR concert being scheduled for May 3, 1987.

7. Upon information and belief, one of the key issues that was raised during the course of the trial was the issue of the control of the sound mixing board. Alan Thompson, RAR sound

technician, testified that if RAR did not control the mix of the sound, that certain bands would refuse to play at the concert. Alan Thompson also testified that he has extensive meetings and communications with all bands in order to understand the mixing requirements in order for the true expression of the bands music to be expressed. He testified that he is constantly mixing the sound and receiving instructions as to the necessary changes in the mix. In addition, the issue of who controls the mixing board was central to the defendants' case in that defendants went to great lengths to show that the City's leased sound company had an excellent compliment of sound equipment to take care of the needs of bands performing at the RAR event.

8) The Court in its Memorandum Opinion and Order of April 16, 1987 spoke directly to the central issue when it held:

> "... I accept that RAR has a First Amendment right to the use of a sound amplification system capable of producing the quality of sound it desires, and the level of sound necessary to reach throughout the audience area. I do not detect a First Amendment right to own the sound amplification system used. The City's implementation of the Bandshell guidelines provides for a sound amplification system capable of meeting RAR's technical needs and leaves control of the sound "mix" in the hands of RAR. Nothing further is required by the First Amendment...." (See page 13-14 of Exhibit A).

9) It is plaintiff's understanding of this section of the Memorandum Opinion and Order that to leave control of the sound mix in the hands of RAR means that RAR has the right under the First Amendment to manipulate the dials and levers of the sound board to create the necessary mix for the individual bands.

10) Upon information and belief, if the New York Sound technician is permitted to "mix" the sound several scheduled bands will not perform. In addition, and upon information and

belief, the sound mixed by the New York Sound technician and the RAR technician will not be the same. It is further alleged upon information and belief that RAR is in much better position to mix the music in the only manner that will be consistent with the true expression of the band's protected speech.

WHEREFORE, plaintiff respectfully requests that this Court grant its motion to alter, amend or clarify the judgment in this action and with such other relief as the Court deems appropriate.

Dated: New York, New York
April 27, 1987

s/ Noah A. Kinigstein
NOAH A. KINIGSTEIN

Exhibit A Annexed To The Affirmation Of Noah A. Kinigstein

Memorandum Opinion and Order of Haight, J.,
Entered on April 20, 1987

Reproduced in the Appendix to Petition for a Writ of Certiorari at p. 23

Exhibit B Annexed To The Affirmation Of Noah A. Kinigstein

Order of Permanent Injunction and Judgment,
Entered April 26, 1987

REPRODUCED, *SUPRA*, ON PP. JA491—JA493

Notice Of Appeal To The United States Court Of Appeals For The Second Circuit, Entered May 14, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

85 Civ. 3000 (CSH)

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York;

GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks;

SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks;

ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation;

JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation;

MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and

THE CITY OF NEW YORK,

Defendants.

NOTICE OF APPEAL TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Notice is hereby given that Rock Against Racism above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the part of the final order of permanent injunction and judgment which is concerned with the user fee for the Naumburg Bandshell amplification system and the right of Rock Against Racism to use and control their own amplification system at their yearly event at Central Park, New York, and the Court's order to withdraw its decision the constitutionality of the solicitation regulation of the New York City Department of Parks Naumburg Regulations.

May 6, 1987

s/ Noah A. Kinigstein

WISEMAN and KINIGSTEIN
by: NOAH A. KINIGSTEIN
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Notice to:

Peter Zimroth
Corporation Counsel
City of New York
100 Church Street
New York, NY 10007
(212) 566-8311
by: JONATHAN PINES, ESQ.
Assistant Corporation Counsel